No. __-___

IN THE

Supreme Court of the United States

COMMITTEE TO REINSTATE DELAWARE WRESTLING, JUNIATA WRESTLING CLUB, NATIONAL WRESTLING COACHES ASSOCIATION, COMMITTEE TO SAVE BUCKNELL WRESTLING, MARQUETTE WRESTLING CLUB, *AND* YALE WRESTLING ASSOCIATION,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION, MARGARET SPELLINGS, *IN HER OFFICIAL CAPACITY AS SECRETARY OF EDUCATION AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW*, STEPHANIE MONROE, *IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY FOR CIVIL RIGHTS AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW, AND* UNITED STATES OF AMERICA,

RESPONDENTS

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Questions on Preclusion:

With regard to intra-circuit conflicts, whether three-judge appellate panels have authority to follow the holding or *dicta* from subsequent three-judge appellate panels over the controlling holding of a prior three-judge or *en banc* panel of that circuit?

Whether the prior holding or *dicta* of a three-judge or *en banc* panel must give way to a controlling prior authority of this Court that the prior panel did not consider?

Whether *dicta* provide a basis for *res judicata,* issue preclusion, or *stare decisis*?

Whether a federal merits judgment entered without jurisdiction and without ruling on its jurisdiction is open to collateral federal attack to counter a plea of *res judicata?*

Whether *res judicata* – as opposed to issue preclusion – arises from a prior federal judgment that the court lacked subject-matter jurisdiction for pleading defects?

Whether pleading defects on subject-matter jurisdiction are open to a "correctable-defect" rule and, if so, whether the fact underlying the correction must post-date the prior complaint and/or judgment?

Whether *res judicata* or collateral estoppel applies to new causes of action that attempt to litigate a continuing course of unlawful conduct after a prior dismissal on subject-matter jurisdiction that did not implicate the merits and, if not, what degree of new injury vitiates that *res judicata* collateral estoppel?

Questions on Standing:

Whether a court has subject-matter jurisdiction to reach the merits of a federal agency's denial of a petition to amend or repeal a rule, 5 U.S.C. §553(e), if the plaintiff lacks standing to challenge the underlying rule?

Whether, for an equal-protection injury allegedly caused by agency action that regulates or deregulates third parties who then directly cause injury, the plaintiff must es-

tablish redressability by proving receipt to the benefit, as opposed to equalizing the allegedly unequal treatment?

Whether the relaxation of redressability and immediacy in procedural-injury cases applies to plaintiffs alleging an agency's failure to follow its regulations and/or its failure to follow notice-and-comment rulemaking to amend those regulations?

Whether government's *ultra vires* interference with a plaintiff's right to interact with third parties implicates a heightened showing under redressability and causation that the third party would grant the plaintiff the desired result in the absence of the *ultra vires* government interference?

Questions on Judicial Review:

Whether, in an action against a federal agency, a court has subject-matter jurisdiction to reach the merits of a petition to amend or repeal a federal rule, 5 U.S.C. §553(e), if the United States has not waived sovereign immunity?

Whether 20 U.S.C. §1683 waives sovereign immunity for judicial review of rules, regulations, and orders issued under 20 U.S.C. §1682 or, alternatively, makes such actions *reviewable by statute*, and thus outside the adequate-remedy bar of 5 U.S.C. §704 of the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA")?

If not, whether 20 U.S.C. §1681(a)'s implied private right of action constitutes a "special and adequate review procedure" that displaces judicial review of agency action both under the APA and under non-APA nonstatutory review?

If so, whether 20 U.S.C. §1681(a)'s implied private right of action displaces such review even as to plaintiffs who – due to a lack of capacity or standing – could not assert an action under 20 U.S.C. §1681(a)?

Whether 20 U.S.C. §1681(a)'s implied private right of action "preempts" or otherwise displaces an action under 42 U.S.C. §1983 for violations of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioners are Committee to Reinstate Delaware Wrestling ("CRDW"), Juniata Wrestling Club ("JWC"), National Wrestling Coaches Association ("NWCA"), Committee to Save Bucknell Wrestling ("CSBW"), Marquette Wrestling Club ("MWC"), and Yale Wrestling Association ("YWA"). In addition, the plaintiffs in the district court and appellants in the court of appeals included College Sports Council ("CSC"). After remand to the district court under the appellate mandate, CSC dismissed its claims and does not join this petition. NWCA, CSC, YWA, MWC, and CSBW were plaintiffs in *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 263 F.Supp.2d 82 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004), *reh'g denied*, 383 F.3d 1047 (D.C. Cir. 2004) ("*NWCA*"). CRDW and JWC did not participate in *NWCA*.

Respondents are the U.S. Department of Education ("DOE"), its Secretary (now Margaret Spellings) in her official capacity and individual capacity under color of legal authority, its Assistant Secretary for Civil Rights (now Stephanie Monroe) in her official capacity and individual capacity under color of legal authority, and the United States. Officer substitutions aside, respondents were the defendants in district court and appellees in the court of appeals.*

Pursuant to this Court's Rule 29.6, petitioners state that NWCA and JWC are non-profit corporations, CRDW, CSBW, MWC, and YWA are nonprofit associations, and no publicly held company owns any interest in any petitioner.

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* Secretary Spellings and Assistant Secretary Monroe substituted for the initial officeholders. FED. R. CIV. P. 25(d)(1); FED. R. APP. P. 43(c)(2).

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PETITION FOR WRIT OF *CERTIORARI*

Petitioners respectfully ask this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 465 F.3d 20 (D.C. Cir. 2006), and reprinted in the Appendix ("App.") at 1a. The decision of the district court is reported at 357 F.Supp.2d 311 (D.D.C. 2005), and reprinted with the accompanying order at 5a and 10a, respectively.

JURISDICTION

The court of appeals' decision was filed on September 26, 2006, and a timely petition for rehearing and rehearing *en banc* was denied on January 19, 2007. On April 9, 2007, petitioners timely applied to extend until June 4, 2007, the time within which to file the petition for *certiorari*, which was granted on April 12, 2007 (No. 06-A-968). The district court had jurisdiction pursuant *inter alia* to 28 U.S.C. §§1331, 1343(a)(4) and D.C. Code §11-501. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

AUTHORITIES INVOLVED

The Appendix quotes relevant excerpts from 20 U.S.C. §§1681-1683, 5 U.S.C. 551, 553, 702, 704, 45 C.F.R. §86.41, and agency orders from 1979, 1996, and 2003. The authorities fall into three discrete substantive and procedural areas:

1. Title IX's protection that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program... receiving Federal financial assistance." 20 U.S.C. §1681(a); 45 C.F.R. §86.41(a) (same for athletics programs sponsored by recipients of federal education funding); U.S. CONST. amend. V, XIV, §1 (same for federal actions and state actions, respectively).

2. The Administrative Procedure Act's notice-and-comment rulemaking requirements, 5 U.S.C. §553, its waiver of sovereign immunity for judicial review of agency action,

id. §702, and the civil rights laws' judicial-review provision and waiver of sovereign immunity. 20 U.S.C. §1683.

3. The civil rights laws' unique presidential-approval requirement before rules, orders, and orders of general applicability take effect, 20 U.S.C. §1682, delegated since 1981 to the Attorney General. 45 Fed. Reg. 72,995 (1980).[1]

STATEMENT OF THE CASE

The panel decision relies on standing (which merges with the merits) and *res judicata.* Accordingly, petitioners outline the statutory and regulatory background as well as the proceedings below both in this litigation and the prior *NWCA* litigation.

Statutory Background

Modeled on §601 of the Civil Rights Act of 1964, Title IX prohibits gender-based discrimination in certain federally funded education programs. 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits intentional discrimination (*i.e.,* actions *because* of gender, not merely *in spite of* gender), *Alexander v. Sandoval,* 532 U.S. 275, 282-83 & n.2 (2001), *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979), and seeks to eliminate all "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances." 117 Cong. Rec. 30,409, 39,251 39,259, 39,262 (1971); 118 Cong. Rec. 5812-13 (1972).

In one key departure from Title VI, Congress included Title VII's restriction against preferential treatment based on imbalances with the population, 20 U.S.C. 1681(b), which is "designed to prevent... undue 'Federal Government interference... because of some Federal employee's ideas of... balance.'" *United Steelworkers of Am. v. Weber,* 443 U.S. 193, 206-

[1] Because no President or Attorney General has approved DOE's Title IX regulations, the original Department of Health, Education, and Welfare ("HEW") Title IX regulations remain in effect for purposes of DOE's Title IX enforcement. 20 U.S.C. §3505(a).

07 (1979). Although §901(b) allows agencies to consider "statistical evidence" in a specific "hearing or proceeding," 20 U.S.C. 1681(b), it "would be contrary to Congress' clearly expressed intent" to allow "quotas and preferential treatment [to] become the only cost-effective means of avoiding expensive litigation." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality); *accord Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652-53 (1989).

Like Title VI, Title IX authorized funding agencies to issues rules to "effectuate" the statutory prohibition against intentional discrimination, 20 U.S.C. 1682, authority the Senate sponsor said "to permit differential treatment by sex" only in "*very unusual* cases" where "such treatment is *absolutely necessary*," such as the need for privacy in locker rooms. 118 Cong. Rec. 5807 (1972) (emphasis added). Otherwise, §902 is identical to §602, *compare* 20 U.S.C. §1682 *with* 42 U.S.C. §2000d-1, which provides the only history that explains §902.[2] That history makes clear that agencies must act via rules, regulations, and orders of general applicability, 42 U.S.C. §2000d-1, which do not take effect unless and until signed by the President in the *Federal Register*. *Id.*; 110 Cong. Rec. 2499-00 (1964) (Rep. Lindsay); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982).[3] Finally, Title IX adopts

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[2] *See, e.g.*, 118 Cong. Rec. 5803 (Title IX would have the same procedural protections afforded under Title VI) (Sen. Bayh); *id.* at 5808 ("These provisions [including what became Section 902] parallel Title VI of the 1964 Civil Rights Act") (Sen. Bayh); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., at 170 (1975) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (prepared statement of Sen. Bayh) (hereinafter "*1975 Hearing*").

[3] Title VI's proponents repeatedly cited presidential approval as a bulwark against bureaucratic overreaching. *See, e.g.*, 110 Cong. Rec. 6562

(Footnote cont'd on next page)

Title VI's judicial review provision, *compare* 20 U.S.C. §1683 *with* 42 U.S.C. §2000d-2, which makes rules, regulations, and orders subject to the same judicial review available for similar actions by the agency.

Regulatory Background

The Three-Part Test formed through a series of unlawful amendments of the original 1975 Title IX regulations. In summary, the regulatory standard changed from (a) equal opportunity, based on interest, with a need to assess the interest of both genders in 1975 to equal participation, based on enrollment, with no need to assess the interest of the "over-represented" gender (*i.e.*, men) in 1996 and beyond; (b) a non-prospective, non-binding document for complaints pending in 1979 to a prospective "legal obligation" in 1996 and beyond; (c) subject to a regulatory and statutory prohibition against discrimination in 1975 and 1979 to safe harbors that authorizes gender-conscious cutting and capping solely to meet an enrollment-based quota in 1996 and 2003. All of these required notice-and-comment rulemaking.

1975 Regulations. Unlike the statute, the 1975 regulations: require equal opportunity, based on interest and ability, 45 C.F.R. §86.41(c)(1); "require institutions to take the interests of both sexes into account in determining what sports to offer," 40 Fed. Reg. 24,128, 24,134 (1975); and au-

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(Footnote cont'd from previous page.)

(Sen. Kuchel); 110 Cong. Rec. 7059 (Sen. Pastore); 110 Cong. Rec. 5256 (Sen. Humphrey); 110 Cong. Rec. 6544 (Sen. Humphrey); 110 Cong. Rec. 6749 (Sen. Moss); 110 Cong. Rec. 6988 (explanatory memorandum by Rep. McCulloch, inserted by Sen. Scott); 110 Cong. Rec. 7058 (Sen. Pastore); 110 Cong. Rec. 7066 (Sen. Kuchel); 110 Cong. Rec. 7067 (Sen. Kuchel); 110 Cong. Rec. 7103 (Sen. Javits); 110 Cong. Rec. 11,941 (letter from Attorney General Kennedy, inserted by Sen. Cooper); 110 Cong. Rec. 12,716 (Sen. Humphrey); 110 Cong. Rec. 13,334 (Sen. Pastore); 110 Cong. Rec. 13,377 (Sen. Allott).

thorize schools to do so "in any reasonable way the school considers appropriate," *id.* As the Secretary of HEW testified to Congress, "the interest and abilities of both sexes... obviously involves learning about those interests in one way or another." *1975 Hearing*, at 440.

1979 Policy Interpretation. Contrary to the 1975 regulations, the 1979 Three-Part Test would narrow schools' latitude to three options: (1) a quota based on enrollment ratios, (2) progress on the way to prong one, and (3) fully accommodating the underrepresented gender's interest. 44 Fed. Reg. 71,418. In doing so, however, HEW expressly (if obliquely) states that the document does not apply prospectively, 44 Fed. Reg. 71,414 (disavowing "a separate section on institutions' future responsibilities"), and instead refers future compliance to the interest-and-abilities section of the regulation, *id.* Archival documents from HEW incorporated into the complaint make clear that HEW very carefully and publicly contorted its document to avoid procedural requirements. *See* ¶¶50-53 (App. 82a-84a).[4] In addition, throughout the 1980s, DOE interpreted prong three ("full accommodation") to mean accommodating the gender's relative interest to the same relative extent (*i.e.*, proportional to *interest*, not *enrollment*). ¶84 (App. 91a).

1996 Clarification. In its press release announcing its 1996 clarification, DOE characterizes the Three-Part Test as "legal obligations." ¶77 (App. 90a). Unlike the 1979 version, the 1996 version purports to be a prospective legal requirement. App. 36a ("The rules here are straightforward. An in-

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[4] Concerned primarily with ensuring that the document did not constitute an "interpretation" under General Education Provisions Act, *See* ¶55 (App. 84a), HEW unfortunately neglected to consider the breadth of "order," which this Court announced a year later. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238, n. 7 (1980).

stitution can choose to eliminate or cap teams as a way of complying with part one of the three-part test"). Further, unlike the 1979 version, the 1996 version's third prong requires full accommodation only of the underrepresented gender, changing the 1979 version's focus on relative accommodation. ¶84 (App. 91a).

2003 Clarification. Unlike its 1996 version, the 2003 version makes prongs two and three safe harbors. ¶89 (App. 92a). The 2003 version otherwise reaffirms its 1996 version.

Proceedings in Lower Courts

District Court. CSC filed the initial complaint to challenge DOE's denial of its petition to repeal the Three-Part Test. On May 24, 2004, the district court ordered the parties to show cause why it should not dismiss this action based on the appellate decision in *NWCA*. After CSC filed its opening brief (it was not allowed a reply), the petitioners here joined the litigation via the amended complaint. In response to the show-order, the government argued for dismissing the complaint against all parties, Because the show-cause order did not provide plaintiffs other than CSC an opportunity to be heard, the two new parties (CRDW and JWC) moved to strike the section of the government's brief calling for their dismissal. Relying on *res judicata* and *stare decisis* from *NWCA*, the district court dismissed all parties and all counts on both standing and the adequate-remedy bar. App. 8a-9a.

Court of Appeals. The court of appeals relied on *res judicata* on standing to dismiss the challenges to the statutory and constitutional merits, App. 2a-3a, but found standing for CSC's petition-denial claim. App. 3a. The court apparently confined further proceedings to the arbitrariness of not repealing the Three-Part Test in 2003, as distinct from the arbitrariness or unlawfulness of its initial adoption. App. 3a-4a. The appellants other than CSC petitioned for rehearing, which the *en banc* court and panel denied.

***NWCA* District Court.** Filed on January 16, 2002, the *NWCA* complaint included the counts in the complaint here

with the exception of counts for events that had not yet occurred (*i.e.*, the 2003 Clarification and CSC's petition-denial claim) and counts alleging that Title IX and its regulations were unconstitutional to the extent that they authorized the Three-Part Test. Unlike the complaint here, the *NWCA* complaint did not include specific allegations on standing, relying instead on the authorization of otherwise-illegal conduct. The district court dismissed on standing, but reached the merits of NWCA's petition-denial claim. *NWCA*, 263 F.Supp.2d at 82.

***NWCA* Court of Appeals.** In affirming the district court's dismissal on May 14, 2004, a divided panel relied on two alternate - indeed *mutually exclusive* - grounds: standing to challenge government regulation of third parties and the limitation on the United States' waiver of sovereign immunity posed by 5 U.S.C. §704's "adequate-remedy bar." *NWCA*, 366 F.3d at 930. On petition for rehearing, Judge Williams again dissented, and the majority issued a *per curium* decision dated October 8, 2004. *NWCA*, 383 F.3d at 1047. To support its first ground (standing), the panel majority opines that Title IX and its regulations "may" allow "some" of the challenged conduct (*i.e.*, cutting and capping of men's teams solely to comply with a quota). 366 F.3d at 940-41. To support the alternate ground, the majority opines that Title IX provides an adequate remedy to sue for Title IX and regulatory *violations*. 366 F.3d at 946; 383 F.,3d at 1048. The panel decision expressly claims "[their] holding... does not prevent appellants from obtaining review of their claims on the merits, when raised in a judicially reviewable case or controversy." 366 F.3d at 947. Without specifically addressing why NWCA had standing to bring a petition-denial claim or how the United States waived sovereign immunity for such claims, as distinct from NWCA's rule challenge, *NWCA* reaches the merits of NWCA's petition-denial claim by deciding that NWCA's letter was not a petition. 366 F.3d at 948-49. The appellate mandate provides "[i]t is hereby or-

dered and adjudged that the District Court's rejection of appellant's claim that the Department unlawfully denied their petition to amend or repeal the Three-Part Test be affirmed and the remaining claims be dismissed."

***NWCA* District Court's Reconsideration.** In June 2004, between the two appellate *NWCA* decisions, the *NWCA* plaintiffs sought to file a timely motion for reconsideration, primarily for new evidence and changed circumstances. FED. R. CIV. P. 60(b). Although the case was under an electronic case filing order, the court directed plaintiffs' counsel to lodge the motion in paper form, with copies on a compact disc. On June 29, 2004, the court ordered the parties to brief the district court's jurisdiction to consider a motion to reconsider while the appeal was pending. In their briefs, the parties agreed that the court could consider and deny the motion without appellate leave. The district court has yet either to docket or to rule on the motion. The district court docketed the appellate mandate on November 9, 2004.

REASONS TO GRANT THE WRIT

This litigation presents several circuit splits involving judicial review under civil rights laws (Section III.A), third-party standing (Section II.C), and preclusion (Sections I.A, I.D, I.E and III.D). Removed from its athletics and discrimination setting, the underlying claim is ubiquitous and important: federal agencies rely on unlawful memoranda arbitrarily to regulate third-party power centers (*e.g.*, state and local government, employers, and contractors), thereby causing indirectly injuring the public when third parties follow federal policy. The panel would shield such lawlessness.

I. PRECLUSION AND *STARE DECISIS*

"In properly seeking to deny a litigant two days in court, courts must be careful not to deprive him of one." *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 29 (2nd Cir. 1986) (quotations and citations omitted). By ruling on *res judicata* (for the *NWCA* plaintiffs) and *stare decisis* (for CRDW and

JWC), the panel deprives all petitioners of their day in court. Before establishing standing and judicial review in Sections II and III, respectively, petitioners address preclusion here.

After a merits ruling, *res judicata* (or claim preclusion) bars new litigation between the parties based on the same claim. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). By contrast, under collateral estoppel (or issue preclusion), "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The scope of preclusion depends on whether the new action presents the same issues, whether legal principles have changed, and whether "other special circumstances" warrant departure from preclusion's normal rules. *Montana v. U.S.*, 440 U.S. 147, 155 (1979).[5] Preclusion never applies to nonparties like CRDW and JWC. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998). Moreover, while preclusion can bind even if wrong, *stare decisis* evaporates when trumped by superior authority.

Provided that "the question of subject-matter jurisdiction ha[s] been fully litigated," this Court treats findings of subject-matter jurisdiction as *res judicata* in subsequent actions to enforce a prior judgment. *Durfee v. Duke*, 375 U.S. 106, 112 (1963); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxetes de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("party that

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[5] *Cf. McCurry*, 449 U.S. at 94 (estoppel principles "cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate [an] issue in the earlier case"); *Montana*, 440 U.S. at 163 ("special circumstances" that vitiate preclusion are "unfairness or inadequacy" of the prior proceedings); *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 333 (1971)) (no preclusion if prior proceeding was "seriously defective" and party lacked "a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time").

has had an opportunity to litigate the question of subject-matter jurisdiction may not [collaterally attack] upon an adverse judgment [because] principles of *res judicata* apply to jurisdictional determinations - both subject matter and personal"). "The preclusive effect of a finding that jurisdiction *does not exist* is less settled," *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1196 (D.C. Cir. 1983) (Wald, J., dissenting) (emphasis added), primarily where the dismissal flowed from a curable defect. *See* Section I.D, *infra.*

A second court should inquire whether the first court found jurisdiction before enforcing the prior court's judgment. *Underwriters Nat. Assur. Co. v. North Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) ("judgment is entitled to full faith and credit - even as to questions of jurisdiction - when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment"). Here, *NWCA* reached the merits only against NWCA and without expressly addressing its jurisdiction for doing so, leaving *NWCA* open to jurisdictional challenge here (Section I.B, *infra.*). Stripped of its merits holding on jurisdictional grounds as to *any* party, *NWCA* could support no more than collateral estoppel on issues related to standing, not *res judicata* as the panel held. *Underwriters*, 455 U.S. at 706; *accord, e.g., Lops v. Lops*, 140 F.3d 927, 937-38 (11th Cir. 1998); *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1442 n.17 (9th Cir. 1996).

A. Panels Lack Authority to Ignore Precedent. Based on *NWCA* and other controlling decisions of this Court and the D.C. Circuit, certainly the two new plaintiffs and arguably the five *NWCA* plaintiffs are entitled to a hearing. Respect for precedent demands that lower courts honor *stare decisis* across the board, not selectively, as the circuits uniformly have heretofore held. *See, e.g., Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999) (earlier-adopted panel decision controls be-

cause one three-judge panel cannot overrule another); *McMellon v. U.S.*, 387 F.3d 329, 332-33 (4th Cir. 2004) (same); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993) (same); *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996) (same). However it resolves *res judicata* as to the *NWCA* plaintiffs, this Court should reject the panel's cherry picking from prior decisions for CRDW and JWC. As set forth below, controlling precedent entitles *at least* the non-*NWCA* parties to judicial review. Withholding review based on *stare decisis* simply turns the law on its head.

B. No Preclusion without Jurisdiction. The panel decision does not specify whether *res judicata* springs from a court's jurisdiction to determine its jurisdiction or from the *NWCA* panel's reaching the merits on NWCA's petition-denial claim. If the latter, the *NWCA* panel did not address its jurisdiction (which it clearly lacked) to reach the merits. Because it held that NWCA lacked standing to challenge the Three-Part Test, NWCA necessarily also lacked standing to challenge denial of a petition to repeal the Three-Part Test. *Shipbuilders Council of Am. v. U.S.*, 868 F.2d 452, 456 n.3 (D.C. Cir. 1989) (R. Ginsburg, J.). "For a court to pronounce upon the meaning or the constitutionality of a... federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998).

By avoiding standing and sovereign immunity on the petition-denial count in a decision that otherwise reeks of standing and sovereign immunity, the *NWCA* panel appears to have *intentionally* acted *ultra vires* its authority, just to reach the merits. Ironically, and notwithstanding the *NWCA* judicial-review *dicta*, *id.*; *accord Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005) (where pleadings fail to establish standing, "[a]ny statements... on the question of the judicial review bar would be unnecessary *dicta*"), this Court would need to find that Title IX or the APA waives sovereign immunity (which NWCA favors and

NWCA opposes) in order for *NWCA* to have had jurisdiction to reach the merits against *NWCA*. *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 917 (6th Cir. 1986).

C. ***Dicta* Lack Preclusion and *Stare Decisis***. This petition raises two instances of *dicta* masquerading as holding: the availability of judicial review and the underlying claims' statutory and constitutional merits. As indicated in the prior section, the *NWCA* discussion on judicial review is *dicta*. Certainly, if the *NWCA* pleadings had established standing, *NWCA* could not have *dismissed* for sovereign immunity: the court could merely have fastidiously required the plaintiffs to name the officers. *See* Section III.B, *infra;* FED. R. CIV. P. 25(d)(2); FED. R. APP. P. 43(c)(1); *see also* 366 F.3d at 937 ("[a]bsent a showing of redressability,... we have no jurisdiction to consider their claims"); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636-37 (2002) ("inquiry into whether suit lies under *Ex parte Young* does not include [merits] analysis"). *NWCA*'s judicial-review analysis is entirely gratuitous (*i.e., dicta*).

More centrally to this litigation, and somewhat remarkably, the panel would have *NWCA* resolve the statutory and constitutional merits not only for the *NWCA* parties under *res judicata,* but also for all parties under *stare decisis.* App. 2a-3a; *but see* 366 F.3d at 947 ("[o]ur holding today thus does not prevent appellants from obtaining review of their claims on the merits, when raised in a judicially reviewable case or controversy"). Like the plaintiffs here (Section II.B, *infra*), the *NWCA* plaintiffs argued for standing based on the authorization of otherwise-illegal conduct, which *NWCA* rejected because Title IX itself and its regulations "*may*" authorize "*some*" of the challenged conduct, but the *NWCA* pleadings challenged only the Three-Part Test. 366 F.3d at 940 (emphasis added). Because it assumed that some of the

challenged conduct *violated* Title IX and its regulations, 366 F.3d at 946; 383 F.3d at 1048, *NWCA* certainly did not *hold* that Title IX or its regulations authorize *all* of that conduct.[6]

"It is hard to suppose that the [*NWCA*] majority definitively rejected these [merits] arguments without explaining why." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S.Ct. 1786, 1794 (2007). If the *NWCA* panel had intended to resolve the merits, "one would expect it to have said so." *Id.* Instead, *NWCA* expressly disavowed reaching the merits. 366 F.3d at 947 (quoted *supra*); *cf. Office of Senator Mark Dayton v. Hanson*, 127 S.Ct. 2018, 2020-21 (2007) (denying defendant's motion to dismiss does not implicate constitutionality of act, though the Constitution may limit the scope of future proceedings).

One must assume that the elliptical *NWCA* majority held that the *NWCA* plaintiffs did not carry their burden to establish that gender-conscious remedies *against them* violated Title IX or its regulations. Plaintiffs cure that defect by pleading that none of the relevant schools has been adjudged to have committed the intentional gender-conscious discrimination *against women* that would authorize otherwise-discriminatory, gender-conscious remedies *against plaintiffs* here. ¶22 (App. 73a). For good measure, plaintiffs cure another *NWCA*-identified defect by pleading that – if they authorize such conduct – Title IX and its regulations are

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[6] Indeed, whatever its view of the merits, the *NWCA* panel had to assume the *NWCA* plaintiffs' merits view to establish subject-matter jurisdiction. *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 439 (D.C. Cir. 1986) ("we must assume the challenging party's view of the merits in determining ripeness"); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) (same for standing). And the *NWCA* plaintiffs most assuredly sued because the Three-Part Test violates Title IX and its regulations. 383 F.3d at 1048 ("heart of appellants' claim in this case is that universities have taken actions that violate Title IX and Title IX's implementing regulations").

unconstitutional. ¶¶159-160 (App. 108a-09a).[7]

Because neither the *NWCA* pleadings nor even briefing mentioned any public schools, *NWCA* did not raise the issue of the Three-Part Test's authorizing public schools to violate the *NWCA* plaintiffs' Fourteenth Amendment rights. Anything in *NWCA* on the Fourteenth Amendment is *dicta*. By contrast, the new plaintiffs (JWC and CRDW) allege that their schools are subject to the Fourteenth Amendment, ¶¶10-11 (App. 68-69a), and controlling precedent provides them standing to challenge the federal authorization because their schools cannot forego federal funds to continue the discrimination. *Compare Comm. for Full Employment v. Blumenthal*, 606 F.2d 1062, 1066 (D.C. Cir. 1979) *with NWCA*, 263 F.Supp.2d at 117-18 (private "institutions could elect to forgo federal funding and still engage in intentional discrimination"). As signaled above, *NWCA* provides that - to premise standing on the authorization of otherwise-illegal conduct - plaintiffs must challenge Title IX and its regulations for authorizing gender-conscious discrimination to meet a federal quota. Mission accomplished: ¶¶159-160 (App. 108a-109a). Even if this comes too late to save the *NWCA* plaintiffs, it establishes standing for the non-*NWCA* plaintiffs.

D. Pleading Defects Lack Preclusion or *Stare Decisis*. At common law, parties could re-litigate to perfect subject-matter jurisdiction. *Costello v. U.S.*, 365 U.S. 265, 285-86 (1961) (*citing, e.g., Hughes v. U.S.*, 71 U.S. (4 Wall.) 232, 237 (1866)); *Gilman v. Rives*, 35 U.S. (10 Pet.) 298, 302 (1836); *Cromwell v. County of Sac*, 94 U.S. 351, 364 (1876) ("judgment

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[7] *NWCA*, 366 F.3d at 936 ("With th[e] context in mind" that appellants "do not challenge Title IX or the 1975 regulations" "it is clear that appellants have no standing"); *id.* at 940-41 (otherwise-illegal standing "cases would only support appellants' assertion of standing if appellants took the position that gender-conscious elimination of men's sports teams would be illegal in the absence of the challenged enforcement policies").

on demurrer in the first suit is not a bar to the second"). The circuits uniformly recognize a curable-defect exception, but differ on whether the missing pleading must post-date the prior dismissal. *Compare Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (limiting exception to subsequent incidents, with remedy to diversity post-dating original dismissal) (Scalia, J.) *with Mann v. Merrill, Lynch, Pierce, Fenner & Smith*, 488 F.2d 75, 76 (5th Cir. 1973) (prior dismissal for failure to allege diversity no bar to suit pleading diversity); *see also Park Lake Res. Ltd. Liab. v. U.S.D.A.*, 378 F.3d 1132, 1137 (10th Cir. 2004) (requires reliance on new fact or occurrence); *Stewart Sec. Corp. v. Guar. Trust Co.*, 597 F.2d 240, 242-43 (10th Cir. 1979). Other circuits are more forgiving. *Lebron-Rios v. U.S. Marshal Serv.*, 341 F.3d 7, 13-14 (1st Cir. 2003); *Snider v. Melindez*, 199 F.3d 108, 111-12 (2nd Cir. 1999). The "curable-defect exception allows relitigation of a claim of jurisdiction, [but not] the standards by which jurisdiction is ascertained." *GAF Corp. v. U.S.*, 818 F.2d 901, 913 (D.C. Cir. 1987). Moreover, such preclusion is "limited to matters actually raised and necessarily decided," and - unlike a judgment on the merits - "does not extend to matters that *could have been raised.*" *GAF*, 818 F.2d at 912.

Determining subject-matter jurisdiction for standing and sovereign immunity depends on the adequacy of the "particular claims asserted" in the pleadings. *Allen v. Wright*, 468 U.S. 737, 752 (1984) (standing inquiry focuses on a party's specific common-law, statutory or constitutional claims through "careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication"); *Arrowsmith v. Gleason*, 129 U.S. 86, 99 (1889) ("absence of... adequate remedy at law... must depend on the character of the case as disclosed in the pleadings"). Thus, dismissal generally concerns only the "particular claims asserted" in the pleadings.

For example, *NWCA* held that nothing in the *NWCA* pleadings indicated that schools would not simply forego

federal funds to avoid the new, post-litigation regulations. 263 F.Supp.2d at 117-18 (quoted *supra*). Petitioners cure that oversight by pleading that schools cannot afford that luxury and citing evidence (including post-*NWCA* evidence on Yale) that schools will change their high principles to remain eligible for federal funds. ¶20 (App. 72a). Condemning non-*NWCA* parties to the *NWCA* plaintiffs' pleading defects under *stare decisis* violates due process every bit as much as the virulent form of *res judicata* struck down in *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999).

E. *Res Judicata* Inapposite to New Cause of Action. Similarly, because *res judicata* does not apply to new causes of actions, *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327-28 (1955), the panel erred by condemning the *NWCA* plaintiffs to repeat the *NWCA* pleading defects. After the *NWCA* judgment, the defendants again clarified the Three-Part Test. ¶88 (App. 92a). By both reaffirming parts of the Three-Part Test and changing others, *id.*, the federal defendants opened the Three-Part Test to new attack, without the need for a rulemaking petition. *I.C.C. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987) ("[w]hen the [agency] reopens a proceeding for any reason and, after reconsideration, issues a new and final order setting forth the rights and obligations of the parties, that order – even if it merely reaffirms... the original order – is reviewable on its merits") (citation omitted); *accord Nat'l Ass'n of Mfrs. v. U.S. Dept. of Interior*, 134 F.3d 1095, 1104 (D.C. Cir. 1998). Thus, in addition to the petition-denial claim unique to CSC, all plaintiffs have a new, non-precluded rule challenge.[8]

Although *res judicata* does not apply to new causes of

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[8] Because they included a general prayer, ¶163.D. (App 114a), petitioners are entitled to any relief supported by the complaint. *Bemis Bros. Bag Co. v. U.S.*, 289 U.S. 28, 34 (1933); *Lockhart v. Leeds*, 195 U.S. 427, 436-37 (1904).

action, *Lawlor, supra,* the circuits are split on how to apply that rule. *Compare Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 36 (8th Cir. 1964) (*res judicata* applies to actions with same parties alleging only continuing violations of the type involved in prior action) *with Cellar Door Prods., Inc. of Michigan v. Kay*, 897 F.2d 1375, 1377 n.1 (6th Cir. 1990) ("suit based upon a course of wrongful conduct occurring subsequent to the judgment in the prior suit is not based on the same but on a different cause of action") (disagreeing with *Engelhardt*) *and Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152, 157 n.11 (5th Cir. 1971) (*res judicata* need not apply where the same wrongful act invades two separate and distinct primary rights). In addition to the split on the scope of *res judicata*'s new-action exception, the circuits disagree on the timing trigger: filing of the complaint vs. entry of judgment. *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 739 (9th Cir. 1984) (*res judicata* does not extend to actions that arose after filing the complaint); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992) (same); *S.E.C. v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1464-65 (2nd Cir. 1996) (same); *cf. Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986) (limiting *Lawlor* to instances where subsequent action arose after the *judgment* in the first action). By barring a cause of action that post-dates the *NWCA* complaint, the panel extended *res judicata* far beyond its bounds.[9]

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[9] The panel appears to use *res judicata* on standing to exclude statutory and constitutional arguments from the petition-denial claim it found to survive preclusion. App. 3a. As explained in the text, *res judicata* does not extend to new causes of action, period. Having found standing to repeal the Three-Part Test as arbitrary and capricious, App. 3a, that standing extends to *all* legal arguments for doing so. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978) (no nexus requirement outside taxpayer standing, and declaratory relief available on unconstitutional takings even if plaintiff's injury is merely aesthetic).

F. Unfair to Bind *NWCA* Parties. Even if *res judicata* could apply to their claims, the *NWCA* plaintiffs submit that it should not. First, *NWCA* misread a misleading government report to find a 36-team net *increase* in men's teams., not the *decrease* in the *NWCA* pleadings.[10] While holding that the *NWCA* plaintiffs failed to prove causation so convincingly that redressability necessarily follows, 366 F.3d at 942, *NWCA* analyzed the *wrong injury*. Given the interrelationship between injury, causation, and redressability, it is neither fair nor even correct for *NWCA* to control on standing. Second, this Court's supervening *Jackson v. Birmingham Bd. of Educ.* decision represents a sea change in Title IX's scope,[11] providing coaches direct rights against disparate treatment, based on the gender *of third-party student-athletes*. These new rights counsel against precluding NWCA's coaches without a hearing. *Montana*, 440 U.S. at 155 (changes in "controlling facts or legal principles" warrant revisiting preclusion).

II. STANDING

Standing presents a tripartite test: injury, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-

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[10] Respondent United States' materially misstated report compares teams at 1,185 schools in 1981-82 versus teams at 1,319 schools in 1998-99 to find 36 more teams (+0.4%) spread over 134 more schools (+11.3%).

[11] *Jackson* held that a prior decision, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), had held that 42 U.S.C. §1982 provides landlords a federal discrimination action for retaliation against landlords, based on third-party tenants' race. 125 S.Ct. 1497, 1505 n.1 (2005). This was entirely unforeseeable because *Sullivan* came to the Court on review of a state-court equity suit (*i.e.*, one lacking an adequate legal remedy). *Sullivan v. Little Hunting Park, Inc.*, 209 Va. 279, 163 S.E.2d 588 (Va. 1968); *Ewing v. Dutrow*, 128 Va. 416, 104 S.E. 791, 792-93 (Va. 1920) ("wherever there exists at law a complete and adequate power, either for the prosecution of a right or the redressing of a wrong, courts of equity... have no jurisdiction or power to act") (citations and quotations omitted). Previously, *Sullivan* had stood for third-party standing. *Craig v. Boren*, 429 U.S. 190, 195 (1976).

62 (1992). Direct injuries pose "little question" of causation or redressability, but plaintiffs must make heightened showings when government action affects third parties, who then cause injury. *Id.* Although *NWCA* found only indirect, third-party injuries, the pleadings here allege *direct* injury, which obviates the heightened showing on which *NWCA* hung. In any event, the pleadings here also establish indirect injuries.

A. First-Party Injuries. Unlike *NWCA*, petitioners here allege that they would avail themselves of the administrative-complaint process in the event that schools continue to violate the Title IX regime in place after they prevail in this litigation. ¶28 (App. 75a). Before filing now-futile administrative challenges, petitioners of course have standing to challenge the federal rules and orders that govern that process. *Int'l Union v. Brock*, 477 U.S. 274, 284 (1986) (standing to challenge federal guidelines that govern federal benefit programs). Under the requested relief, petitioners would recover their now-futile right to file administrative complaints to enforce both Title IX and its equal-opportunity regulations in the less-expensive forum of their choice. ¶28 (App. 75a). Losing the opportunity to file in the "forum of... choice" is a cognizable injury in fact, *Int'l Primate Protection League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991), and one that defendants *directly* inflicted on the plaintiffs.

Similarly, by interfering with the terms on which they interact with schools, the Three-Part Test *directly* injures petitioners. Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 299 (1984) ("a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction"); *FAIC Securities, Inc. v. U.S.*, 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (*citing* Monaghan) (Scalia, J.); *Law Offices of Seymour M. Chase, P.C. v. F.C.C.*, 843 F.2d 517, 524 (D.C. Cir. 1988) (R. Ginsburg, J.); *Columbia Broad. Sys., Inc. v. U.S.*, 316 U.S. 407, 422-23 (1942); *Haitian*

Refugee Ctr. v. Gracey, 809 F.2d 794, 811 n.13 (D.C. Cir. 1987) (no "independent need.... to establish third party standing since the legal right they asserted - the right not to be injured by unauthorized agency action - was their own"). This injury further manifests itself when third-party schools refuse offers to endow or fund teams (*e.g.*, Yale, Marquette) or demand offsetting contributions for the other gender's teams to remain in compliance with proportionality (*e.g.*, Bucknell), which they would not do for a similar offer to fund only a women's team. ¶26 (App. 74a-75a).

Significantly, *NWCA* did not address these *direct* injuries, *compare* 263 F.Supp.2d at 107 (*NWCA* pleadings failed to allege fans' and alumni's intent to view or assist sports and athletes in the future) *with* ¶18 (App. 70a-71a) (alleging present and future interest and injury), which do not implicate the heightened showing of causation or redressability on which *NWCA* hung. Like the developer in *Arlington Heights*, plaintiffs here "[c]learly... me[e]t the constitutional requirements, and... therefore ha[ve] standing to assert [their] own rights," the "[f]oremost" of which is the "right to be free of arbitrary or irrational [agency] actions." *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 263 (1977); *AFL-CIO v. McElroy*, 367 U.S. 886, 894 (1961).

B. Otherwise-Illegal Conduct. Indirect injury presents no obstacle where government action authorizes otherwise-illegal conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (government authorization sufficient to confer standing); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976) (privately inflicted injury is traceable to government action if the injurious conduct "would have been illegal without that action"). The Due Process Clause includes an equal-protection component applicable to the federal government, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), which follows the same equal-protection analysis as the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Under this analysis, numerical "balance is not to be

achieved for its own sake," and there is "no duty to remedy imbalance... caused by demographic factors." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). Only prior intentional discrimination could authorize a gender-conscious remedy that entails reverse discrimination. 45 C.F.R. §§86.3, .41(a); *U.S. v. Fordice*, 505 U.S. 717, 732 n.7 (1992), and HEW expressly did not find "the universal presence of discrimination." 44 Fed. Reg. 71,420; *cf.* 40 Fed. Reg. at 24,134 (HEW dropped a proposed athletics "requirement [that] could be considered 'affirmative action' and somewhat inconsistent with §86.3").

In *Truax v. Raich*, 239 U.S. 33, 36-38 (1915), an alien had standing to challenge a law under which his employer would dismiss him *solely* to meet the law's percentage quota on aliens in *employers'* workforces. Similarly, petitioners have standing to challenge government policies and practices that authorize and direct schools to cut and cap their teams *solely* to meet proportionality, without considering relative interest, in violation of Title IX, 20 U.S.C. §1681(a), the implementing regulations, 45 C.F.R. §86.41(a), (c)(1), and (for public schools) the Equal Protection Clause, U.S. CONST. amend. XIV, §1. For such preferences, "the burden of justification is... demanding and it rests entirely on the" government. *U.S. v. Virginia*, 518 U.S. 515, 532-33 (1996). In the case of gender-conscious cutting or capping to meet a quota, with no prior finding of intentional discrimination, the government has not met and cannot meet its burden. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982); *U.S. v. Am. Library Ass'n*, 539 U.S. 194, 203 (2003) (Congress may not use spending power to induce recipients "to engage in activities that would themselves be unconstitutional"); *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987). What Congress cannot do by statute, agency staff cannot do by fiat.

C. **Equal Protection**. Given that men have higher athletic interest and women have higher enrollment, ¶23 (App. 73a), the choice of fulcrum – *i.e.*, interest or enrollment – is outcome determinative in defining equal protection.

Schools' application of the Three-Part Test to cut or cap teams and to refuse to reinstate teams (even privately funded teams) constitutes an "invasion of a legally protected interest... in a manner that is 'particularized'" to petitioners' members, which is an injury *per se*, whether or not the plaintiff would secure the benefit with the injury removed. *Adarand Constr., Inc., v. Pena*, 515 U.S. 200, 211 (1995); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) ("'*injury in fact*'... is the denial of equal treatment [from] imposition of the barrier, not the ultimate inability to obtain the benefit") (emphasis added); *Orr v. Orr*, 440 U.S. 268, 273 (1979) ("There is no question but that Mr. Orr bears a burden he would not bear were he female[: that] burden alone is sufficient to establish standing"). *NWCA* relied on the indirect nature of injury to evade these precedents, which this Court foreclosed in *Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) (majority applies the doctrine to third-party cases generally); 524 U.S. at 456-57 (dissent would limit the doctrine to equal-protection cases, such as this one) (Scalia, J., dissenting); *accord Bras v. California Pub. Util. Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995) (applying doctrine to indirect injury). Even if the *NWCA* panel's mistake binds the *NWCA* parties, the panel here was obligated to follow *Clinton* for the non-*NWCA* parties.

D. Procedural Injuries. The Constitution, Title IX, and the APA all confer procedural rights, the denial of which cause redressable injury. *Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right... the alleged deprivation of which can confer standing"). As set forth in the Regulatory Background, *supra*, the evolution of regulatory standards plainly violates the APA.[12] By foregoing the

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[12] *NWCA* holds that no matter what the Title IX rules say, the *NWCA* pleadings did not establish that schools would heed the Title IX rules. To the extent that the *NWCA* panel relied the Three-Part Test's non-binding nature to defeat the *NWCA* complaint's pleading of the rule-change ar-

(Footnote cont'd on next page)

required rulemaking(s), DOE inflicted procedural injury, for which "those adversely affected... generally have standing to complain." *FEC v. Akins*, 524 U.S. 11, 25 (1998). Rescission and a new agency action on remand may produce the same result, *id.*, but until that happens, the initial injury remains "fairly traceable" to the procedurally defective agency action, and redressable by an order striking that action, *id.*

For *procedural* injuries, moreover, petitioners need not show that, but for the procedural lapse, the plaintiff would have received a different substantive result. *Defenders of Wildlife*, 504 U.S. at 573 n.7. Instead, plaintiffs "accorded a procedural right to protect [their] concrete interests" need show only a sufficiently concrete relationship between the procedural step and the substantive result, and the redressability and immediacy requirements apply to the *present procedural violation*, which may injure the concrete interest, rather than to the concrete (but less certain) future injury. *Id.* Given their concrete injuries from gender-based cutting and capping, petitioners do not have a merely abstract interest in APA compliance. They have a direct interest in the federal defendants' following procedures that control schools' consideration of petitioners' rights. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures").

In addition to APA violations and the denial of the Title IX regulation's procedural protections (*i.e.*, consideration of men's athletic interest), petitioners also assert the denial of §902's relatively unique presidential-approval procedure, which protects against bureaucratic overreaching and was

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(Footnote cont'd from previous page.)

gument, 383 F.3d at 1048, the pleadings here supply post-*NWCA* proof of the Three-Part Test's binding nature, thus coming within the curable-defect exception to *res judicata*. Appellate J.A. 340, 342, 364, 432.

vital to securing the enactment of civil rights legislation. *See* nn.2, 3, and accompanying text, *supra.* Nothing in *NWCA* disputes petitioners' position on §902.

III. JUDICIAL REVIEW

The government and district court argued that the adequate-remedy bar precludes this litigation, App. 8a-9a, but the panel confined itself to standing. App 2a. Because this Court reviews holdings, not decisions, and because judicial review merges with preclusion, petitioners address it here.

A. Title IX's Statutory Review. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. §704. Thus, by its terms, the adequate-remedy bar does not reach actions *made reviewable by statute. E.g., Abbott Labs. v. Gardner,* 387 U.S. 136, 140 (1967).

"Any department or agency action taken pursuant to [§902] shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." 20 U.S.C. §1683. By *statutorily* adopting judicial review generally, Title IX (like Title VI) makes rules, regulations, and orders reviewable *by statute,* outside the adequate-remedy bar. *Schlafly v. Volpe,* 495 F.2d 273, 282 (7th Cir. 1974) (Title VI waives federal sovereign immunity); *Selden Apartments v. U.S. Dept. of Housing & Urban Dev.,* 785 F.2d 152, 157-58 (6th Cir. 1986) ("the review provisions of the [APA] are made applicable to agency action taken pursuant to civil rights laws by 42 U.S.C. §2000d-2"); Louis L. Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 432 (1958) ("If a statute provides for judicial review the consent has, of course, been given"); *but see Taylor v. Cohen,* 405 F.2d 277, 280 n.4 (4th Cir. 1968) (citing §704's second clause as precluding review) (arguably *dicta*).

The legislative history of this judicial review provision clarifies not only that Congress intended judicial review, but also that there likely *would not have been a Civil Rights Act* of

1964 (and thus no Title IX) without judicial review. *See* 110 Cong. Rec. 2492 ("If we pick up this old provision which does not provide for judicial review I regret to say that my individual support of the legislation will come to an end") (Rep. McCulloch); C. & B. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act*, 115-16 (1985) (reprinted at Appellate J.A. 447-48);[13] 110 Cong. Rec. 16,001 ("A person aggrieved (including a State or political subdivision thereof) is authorized to obtain judicial review of the action taken by a Federal department or agency either according to judicial review authority contained in the statute authorizing financial assistance or pursuant to the authority contained in the Administrative Procedure Act") (analysis prepared by Rep. McCulloch, submitted by Sen. Dirksen).[14]

NWCA relied on a body of §704 precedents on untimely or nonexistent enforcement (*i.e.*, agency inaction). 366 F.3d at 946. Because §903 applies only to rules, regulations, and orders, petitioners' argument here *need not* unsettle those

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[13] This Court has relied on the Whalens for legislative history of the Civil Rights Act of 1964. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989).

[14] *See also* 110 Cong. Rec. 6566 ("In enacting title VI, however, the House inserted many safeguards and limitations, including judicial review, in order to make certain that Federal power is not misused") (analysis by Republican members of House Judiciary Committee, inserted by Sen. Kuchel); 110 Cong. Rec. 7066 ("section 603 makes clear, in addition to the specific judicial review of any fund cutoff action, that all other agency action taken under section 602 would be subject to the same type of judicial review provided by law for similar action taken on other grounds") (Sen. Ribicoff); 110 Cong. Rec. 6987 ("A person aggrieved (including a State or local governmental authority) is authorized to obtain judicial review of the action taken by the Federal department either according to the judicial review authority contained in the statute authorizing financial assistance or pursuant to authority contained in the Administrative Procedure Act") (analysis by Rep. McCulloch, ranking member of House Judiciary Committee, inserted by Sen. Scott).

precedents. *Compare* 5 U.S.C. §551(13) ("agency action" includes certain inaction) *with* 5 U.S.C. §551(4), (6) ("rule" and "order" do not). In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), this Court provides a more apt dividing line: the *NWCA* panel's precedents did not involve "agency action," 542 U.S. at 61-64, and were committed to agency discretion. 5 U.S.C. §701(a)(2).

B. Officer Suits. "[W]ithout delving [into] particulars," 366 F.3d at 947, *NWCA* states that §704 removes the waiver of sovereign immunity for various non-APA forms of review that the *NWCA* plaintiffs raised. Because the proffered (but not filed) amended complaint named the "Secretary of Education" and the "Assistant Secretary for Civil Rights" in their official capacities, the missing particulars would help determine whether the majority meant that named federal *offices* are part of the "United States" for sovereign-immunity purposes or, instead, overruled blackletter law and centuries of precedent that sovereign immunity does not protect federal *officers* acting *ultra vires.*[15] *See U.S. v. Boutwell*, 84 U.S. (17 Wall.) 604, 607 (1873) ("If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person.... *The writ does not reach the office. It cannot be directed to it.*") (emphasis added); FED. R. CIV. P. 25 Advisory Committee Note to 1961 Amendment (1961 amendments does not address sovereign immunity).

By citing only sovereign immunity, *NWCA* intended the narrower, more playful meaning. Walter Gellhorn, *Sovereign*

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[15] A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002) ("[u]nder the longstanding officer suit fiction recognized in *Ex Parte Young*,... suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity"); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (*Ex Parte Young* doctrine "is equally applicable to a Federal officer acting in excess of his authority").

Immunity in Administrative Law – A New Diagnosis, 9 J. PUB. L. 1, 22 (1960) ("[t]he trouble with sovereign immunity doctrine is that it... transforms everything into a play on words"). The alternate reading would reverse centuries of precedent and would have warranted some "particulars." *Oneida-Herkimer*, 127 S.Ct. at 1794 ("one would expect [the Court] to have said so.... [A]n opinion which is to... establish a principle never before recognized, should be expressed in plain and explicit terms") (citations and interior quotations omitted). In any event, this Court already foreclosed the argument that APA's 1976 amendments expanded §704's preclusive scope. *Darby v. Cisneros*, 509 U.S. 137, 153 (1993); 5 U.S.C. §559; *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999).

Now that petitioners have named and served the officers in both their official and individual capacities, several non-APA, nonstatutory modes of judicial review become available. First, judicial review lies against allegations that officers have acted without statutory authority or unconstitutionally, ¶¶115-124, 159-160 (App. 99a-101a, 108a-09a). *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 689 (1949); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (allows judicial review of unconstitutional acts outside APA's waiver of sovereign immunity). Second, the U.S. District Court for the District of Columbia has unique equity jurisdiction, which extends to federal officers headquartered here. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 580-81 (1838); *Stark v. Wickard*, 321 U.S. 288, 290 & n.1 (1944); *Gamen v. Heckler*, 746 F.2d 844, 851 (D.C. Cir. 1984).[16] Third, §1331 and the Declaratory Judgment Act, 28 U.S.C. §§2201-2202

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[16] The 1976 amendment to §§702-703 did not limit this historic jurisdiction. *See* H.R. Rep. No. 94-1656, at 15-16, *reprinted in* 1976 USCCAN 6121, 6136 (Congress expressly recognizes the District of Columbia district court's continuing jurisdiction as an alternate means to sue federal officers); *see also* 5 U.S.C. §559; *Darby*, 509 U.S. at 153.

("DJA") allows judicial review against agency officers. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).[17] Under both Rule 57 and the DJA, an alternate remedy poses no bar: "the fact that another remedy would be equally effective affords no ground for declining declaratory relief." FED. R. CIV. P. 57 advisory committee note; 28 U.S.C. §2201 (same). Moreover, the availability of declaratory relief in officer suits predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), which the APA did not displace. Administrative Procedure Act: Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess., at 37, 212, 276 (1946).

C. **Title IX's Inadequate Alternate Remedy**. Because it falls within the "generous review provisions" that require "hospitable interpretation" favoring review, *Abbott Labs.*, 387 U.S. at 140-41, the adequate-remedy bar "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Bowen v. Mass.*, 487 U.S. 879, 903 (1988). *A* "restrictive interpretation of §704 would unquestionably... run counter to [the APA's purpose] to remove obstacles to judicial review." *Id.* at 902. Accordingly, this Court interprets §704 merely to codify administrative finality and exhaustion doctrines and to ensure that the "APA [does not] duplicate existing procedures... where the Congress has provided special and adequate review procedures" for review of agency action. *Id.*

APA's legislative history makes clear that §704's first sentence merely stated the "present general state of the law" and "involve[d] no departure from the usual and well-

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[17] In amending §1331 to its current form, Pub. L. 96-486, §2(a), 94 Stat. 2369 (1980), Congress did not repeal the 1976 amendment. *See* H.R. Rep. No. 96-1461, at 3-4, *reprinted in* 1980 USCCAN 5063, 5065; *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (repeal by implication is disfavored).

understood rules of procedure." APA Leg. Hist. 38, 369. Those rules did not preclude a suit against the government by one injured or threatened by third-party action that the government required or authorized. *Truax*, 239 U.S. at 36-38; *CBS*, 316 U.S. at 422-23. As with standing, those threatened by future injury need not await their alternate legal remedy, and a subsequent legal remedy does not displace equity review. *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter").

Even if Title IX confines petitioners' members to enforcement against schools for Title IX violations, §704 would not preclude judicial review of the guidelines under which those enforcement actions proceed. *Int'l Union v. Brock*, 477 U.S. 274, 285 (1986) ("although review of individual eligibility determinations in certain benefit programs may be confined [to other venues], claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court") (collecting cases); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990) ("If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations,... it can of course be challenged under the APA... and the entire [regulatory program] insofar as the content of that particular action is concerned, would thereby be affected"). Thus, remedies against schools do not displace those against the federal defendants.

Moreover, petitioners often lack *any alternate remedy*. Because their action under *Cannon v. Univ. of Chicago*, 441 U.S. 694 (1979), for intentional discrimination does not extend to the equal-opportunity regulations, *Alexander v. Sandoval*, 532 U.S. 275, 285-90 (2001), club programs that seek varsity status (*e.g.*, Yale, Delaware) often lack a legal remedy for either time-barred statutory discrimination (*i.e.*, cutting the

varsity teams in the 1990s when the current members were children) or ongoing regulatory violations (*i.e.*, failing to elevate the club team to varsity, based on interest, today). *Ledbetter v. Goodyear Tire & Rubber Co.*, Inc., 2007 WL 1528298, *6 (U.S. 2007). With *no alternate remedy*, §704 poses no barrier. Similarly, coaches, alumni, boosters, and fans who wish either to help maintain an existing team or to reinstate a cut team face a similar problem: they lack statutory Title IX rights against schools for their injuries.[18]

D. **Title IX's Preemption of §1983**. CRDW and JWC reside in the Third Circuit, where they cannot challenge the Three-Part Test's constitutionality in suits against schools. *Williams v. Sch. Dist.*, 998 F.2d 168, 176 (3rd Cir. 1993); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3rd Cir. 1990). As such, their action against the federal defendants is their *only* remedy. Given the mature circuit split on this issue,[19] this Court should resolve the issue.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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[18] The fact that alumni and fans have standing to assert their aesthetic injuries (Section II.A, *supra*) demonstrates the absurdity of *NWCA*'s "goldilocks" theory of judicial review: plaintiffs need members with a trifle more than too little standing, *Pub. Citizen v. FTC*, 869 F.2d 1541, 1547-48 (D.C. Cir. 1989), but not so much standing that Title IX grants them a private remedy against schools. Under *NWCA*, alumni and fans are "just right" because they have no remedy against schools (thereby sidestepping §704), but can assert their own redressable injuries against the federal government. That cannot be the law, and it is not. *E.g.*, *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51-52 (1955) (APA provides judicial review of agency's final order, even if plaintiff has subsequent judicial remedies).

[19] *Compare id.*; *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7th Cir. 1996) *and Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2nd Cir. 1998) (§1983 preempted) *with Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997); *and Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996) (§1983 not preempted).

June 4, 2007

Respectfully submitted,

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No. __-____

IN THE

Supreme Court of the United States

COMMITTEE TO REINSTATE DELAWARE WRESTLING, JUNIATA WRESTLING CLUB, NATIONAL WRESTLING COACHES ASSOCIATION, COMMITTEE TO SAVE BUCKNELL WRESTLING, MARQUETTE WRESTLING CLUB, *AND* YALE WRESTLING ASSOCIATION,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION, MARGARET SPELLINGS, *IN HER OFFICIAL CAPACITY AS SECRETARY OF EDUCATION AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW*, STEPHANIE MONROE, *IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY FOR CIVIL RIGHTS AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW, AND* UNITED STATES OF AMERICA,

RESPONDENTS

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals for the
District of Columbia Circuit.

College Sports Council, *et al.*,

Appellants,

v.

Department of Education, *et al.*,

Appellees.

No. 05-5133
Argued Sept. 14, 2006
Decided Sept. 26, 2006

Before: RANDOLPH and BROWN, Circuit Judges, and EDWARDS, Senior Circuit Judge.

JUDGMENT

Per Curiam.

This cause was considered on the record from the United States District Court for the District of Columbia, and was briefed and argued by counsel. It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed in part and reversed and remanded in part.

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally funded educational programs and activities. See Education Amendments of 1972, Pub.L. No. 92-318, § § 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. § § 1681-1688) ("Title IX"). Appellants seek reversal of the District Court's dismissal of various challenges to a Department of Education ("Department") Title IX policy interpretation.

Coll. Sports Council v. Dep't of Educ., 357 F.Supp.2d 311 (D.D.C.2005). Appellants claim that the policy interpretation, Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed.Reg. 71,413 (Dec. 11, 1979) ("Three-Part Test"), and subsequent clarifications violate the Constitution, Title IX, and the Administrative Procedure Act ("APA").

We affirm the District Court's judgment that appellants lack standing for want of redressability with respect to their statutory and constitutional claims. Appellants' claims here mirror the claims raised by the plaintiffs in *National Wrestling Coaches Ass'n v. Department of Education,* 263 F.Supp.2d 82 (D.D.C.2003) ("*NWCA*"), aff'd, 366 F.3d 930 (D.C.Cir.2004) ("*NWCA II*"), reh'g denied, 383 F.3d 1047 (D.C.Cir.2004) ("*NWCA III*"). Indeed, five of the seven appellants in this case were claimants in *NWCA*. The District Court dismissed the statutory and constitutional claims in *NWCA* for want of jurisdiction, because the plaintiffs there could not satisfy the redressability prong of Article III standing. 263 F.Supp.2d at 111-12. This court affirmed that judgment in *NWCA II*. See 366 F.3d at 937 ("Appellants offer nothing but speculation to substantiate their claim that a favorable decision from this court will redress their injuries .... Absent a showing of redressability, appellants have no standing to challenge the Department's enforcement policies, and we have no jurisdiction to consider their claims.").

There are no material differences between the complaint in *NWCA* and the complaint in this case with respect to appellants' statutory and constitutional claims. Therefore, the jurisdictional holding in *NWCA II* is res judicata here as to the five parties who appeared in NWCA. See *Dozier v. Ford Motor Co.,* 702 F.2d 1189, 1191 (D.C. Cir. 1983) ("[T]he doctrine of res judicata applies to dismissal for lack of jurisdiction as well as for other grounds ...."). In addition, all parties here are bound by the stare decisis effect of this

court's decisions. The statutory and constitutional issues raised in this case have been conclusively settled by this court in NWCA II and NWCA III. These decisions are thus binding circuit precedent and dispositive of appellants' current statutory and constitutional claims.

There is one notable difference between the instant case and the challenge raised in NWCA. In this case, appellant College Sports Council challenges the Department's denial of its petition for rulemaking. See Petition To Repeal and Amend Guidance Issued Under 34 C.F.R. §106.41(c) Concerning Equal Athletic Opportunity, College Sports Council (Jan. 10, 2003), Joint Appendix ("JA") 12. The petition requested that the Department initiate a rulemaking to repeal the Three-Part Test and to clarify whether the Department's regulations purported to create private rights of action. After the judgment had issued in *NWCA*, the Department denied appellant's petition. See Letter from Rod Paige, Secretary of Education, to Eric Pearson, Chairman, College Sports Council (July 28, 2003), JA 19 (explaining the Department's decision declining to initiate rulemaking).

"[R]efusals to institute rulemaking proceedings ... are subject to a judicial check." *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989). Such review is "extremely limited" and "highly deferential," id., and an agency's decision not to initiate rulemaking will be overturned "only in the rarest and most compelling of circumstances," *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981). In this case, the District Court erroneously concluded that appellant College Sports Council lacked standing to seek judicial review of the Department's denial of the petition to initiate rulemaking. The judgment in *NWCA II* is not res judicata as to this issue and we conclude that the allegations of the complaint are sufficient to confer standing to bring this new claim. Because the District Court failed to consider appellant's challenge to

the Department's refusal to institute rulemaking proceedings, we must remand the case for proper disposition of this issue. On remand, the District Court should address appellant's challenge pursuant to the standards of review enunciated in *National Customs Brokers* and *WWHT, Inc.*

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. R. 41.

United States District Court for the
District of Columbia Circuit.

College Sports Council, *et al.*,

Plaintiffs,

v.

Department of Education, *et al.*,

Defendants.

No. 03-2588-EGS
Filed March 1, 2005

Before: SULLIVAN, District Court Judge.

MEMORANDUM OPINION

I. INTRODUCTION

Plaintiffs, College Sports Council, National Wrestling Coaches Association, Committee to Save Bucknell Wrestling, Marquette Wrestling Club, Yale Wrestling Association, Juniata Wrestling Club, and Committee to Reinstate Delaware Wrestling, are a coalition of associations representing male intercollegiate and scholastic athletes, coaches, and alumni.

Plaintiffs are challenging the rules and policies implementing Title IX of the Education Amendments of 1972, 20 U.S.C. § § 1681-1688 ("Title IX") on the grounds that they violate the Constitution, Title IX, and the Administrative Procedure Act ("APA"). Plaintiffs allege that these rules and policies, specifically the 1979 Policy Interpretation ("Three-Part Test") and its 1996 and 2003 Policy Clarifications, mandate or authorize the very discrimination that Title IX prohibits, by authorizing or encouraging the gender-conscious capping or cutting of

male athletic programs at plaintiffs' academic institutions. Plaintiffs seek declaratory and injunctive relief to vacate the allegedly unlawful rules and policies and to require the United States Department of Education ("The Department") to issue new rules consistent with Title IX and the Constitution.

Plaintiffs filed this case in December 2003, following a prior related dispute before this Court involving many of the same issues and parties. See *Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ.*, 263 F.Supp.2d 82 (D.D.C. 2003) ("*NWCA I*"). The plaintiff groups in the two cases are identical, except for the addition of the Juniata Wrestling Club and the Committee to Reinstate Delaware Wrestling. In *NWCA I*, this Court dismissed plaintiffs' claims on standing grounds, finding that plaintiffs "failed to meet their burden of persuasion on the question of whether or not they are the proper parties...." See id. at 129. The Court of Appeals affirmed. See *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004) ("*NWCA II*"), reh'g denied, 383 F.3d 1047 (D.C. Cir. 2004) ("*NWCA III*").

Because the instant suit involves substantially the same parties and issues as the NWCA litigation, the Court has directed the parties to show cause why it should not be dismissed. Upon careful consideration of the parties' responses, and for the following reasons, the Court is persuaded that plaintiffs' Amended Complaint must be DISMISSED for lack of subject matter jurisdiction.

II. ANALYSIS

The *NWCA* holdings rested on the "redressability prong" of the Supreme Court's test for Article III standing.[1] Both parties conceded that plaintiffs were, in large part, "challenging third-party conduct, namely that of educational institutions seeking to comply with Title IX as currently enforced." *NWCA I*, 263 F.Supp.2d at 110. Although plaintiffs argued that the schools' conduct was a direct result of the challenged Department policies, they could not prove that a favorable decision from the court would redress their injuries. See *NWCA II*, 366 F.3d at 939 (noting that even if appellants prevailed on the merits of their challenge to the Three-Part Test, "nothing but speculation suggests that schools would act any differently..."). In the alternative, the Court of Appeals found that "even if the appellants had standing ... the availability of a private cause of action directly against universities that discriminate in violation of Title IX constitutes an adequate remedy that bars appellants' case." Id. at 945.

Plaintiffs contend that they have cured the jurisdictional defects that required dismissal in *NWCA*, that the principles of res judicata do not bar their claims in this case, and that

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[1] The "irreducible constitutional minimum of standing" requires satisfaction of three elements: First there must be an "injury in fact"-a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be "causation"-a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be "redressability"-a likelihood that the requested relief will redress the alleged injury. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

this action, unlike the prior suit, provides a ripe petition-denial claim.[2] Defendants, on the other hand, argue that none of plaintiffs' new allegations "alter the D.C. Circuit's conclusion that plaintiffs' injuries are not redressable," and that plaintiffs may not attempt to relitigate "the precise issue of jurisdiction that led to the initial dismissal." See Defs. Resp. to Ord. to Show Cause at 3, 7.

Despite plaintiffs' arguments to the contrary, the issue of redressability in this context has been conclusively settled. Although this case presents several additional allegations that the Three-Part Test and associated Department rules are unlawful, plaintiffs offer nothing to distinguish the Court of Appeals' observation in *NWCA II*, that

> the direct causes of [plaintiffs'] asserted injuries-loss of collegiate-level wrestling opportunities for male student-athletes-are the independent decisions of educational institutions that choose to eliminate or reduce the size of men's wrestling teams. [Plaintiffs] offer nothing but speculation to substantiate their claim that a favorable decision from this court will redress their injuries by altering these schools' independent decisions.

NWCA II, 366 F.3d at 936-37. Thus, as noted repeatedly by this Court and the Court of Appeals, the proper remedy for plaintiffs' alleged injuries is an "action directly against

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[2] On July 28, 2003 the Department of Education formally denied plaintiffs' petition to "Repeal the Three-Part Test and its Implementing Guidance; Provide Schools and Student-Athletes with Guidance on Measuring Impact; and Clarify Impact of Regulations on Private Rights of Action." See Pls.' Compl. Ex 3 ("Petition Denial").

universities that discriminate in violation of Title IX." *NWCA II*, 366 F.3d at 945.

The Department's denial of plaintiffs' petition for repeal of the Three-Part Test does not alter this analysis. Although APA § 553(e) requires agencies to receive and consider rulemaking petitions from interested persons, the provision does not independently create jurisdiction to challenge denials of such petitions. See *Shipbuilders Council of America v. United States*, 868 F.2d 452, 456 n. 3 (D.C. Cir. 1989) ("The denial of such a petition is subject to judicial review, *provided that the petitioner can establish the requisite Article III standing.*") (emphasis added). It is not enough to confer standing that plaintiffs can claim to be "interested persons" within the meaning of the statute. See *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 433 (D.C. Cir. 2002) ("The fact that Congress may have given all interested parties the right to petition the agency does not in turn automatically confer Article III standing when that right is deprived."). Therefore, plaintiffs' procedural right to submit a petition to the Department "cannot serve as the basis for Article III standing unless 'the procedures in question are designed to protect some threatened concrete interest of [petitioners'] that is the ultimate basis of his standing." ' Id. (quoting *Lujan*, 504 U.S. at 573 n. 8, 112 S.Ct. 2130). In this case, for the reasons described above, plaintiffs fail this test.

The Court is also mindful of the Juniata and Delaware plaintiffs' concerns about their opportunity to heard and has carefully considered their additional submissions.[3]

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[3] Following the parties' responses to the Court's "Show Cause" Order, the two plaintiff groups not involved in the NWCA case-the Juniata and Delaware ("J & D") plaintiffs-filed a motion for leave to be heard,

(Footnote cont'd on next page)

However, it appears that the Juniata and Delaware plaintiffs are asserting the same causes of action, seeking the same relief, and have alleged injuries that are of the same character as the original *NWCA* plaintiffs. Accordingly, plaintiffs' Amended Complaint shall be DISMISSED for lack of subject matter jurisdiction.

An appropriate Order and Judgment accompanies this Memorandum Opinion.

ORDER

Pursuant to Federal Rule of Civil Procedure 58 and for the reasons stated by the Court in its Memorandum Opinion docketed this same day, it is this 1st day of March, 2005, hereby

ORDERED that this case is DISMISSED for lack of subject matter jurisdiction. It is further

ORDERED and ADJUDGED that the Clerk shall enter final judgment in favor of defendants and shall remove this case from the active calendar of the Court.

(Footnote cont'd from previous page.)

claiming that they would be "fundamentally prejudiced" by an order of dismissal without first being given a chance to "assert why the prior litigation does not control their claims." See J & D Mot. at 2.

United States Court of Appeals for the
District of Columbia Circuit.

College Sports Council, *et al.*,

Appellants,

v.

Department of Education, *et al.*,

Appellees.

No. 05-5133
Filed Oct. Jan. 19. 2007

Before: Randolph and Brown, Circuit Judges, and Edwards, Senior Circuit Judge.

ORDER

Upon consideration of appellants' petition for rehearing, filed December 11, 2006, it is

ORDERED that the petition be denied.

Per Curium

FOR THE COURT:
Mark J. Langer, Clerk
By: Michael C. McGrail
Deputy Clerk

United States Court of Appeals for the
District of Columbia Circuit.

College Sports Council, *et al.*,

Appellants,

v.

Department of Education, *et al.*,

Appellees.

No. 05-5133
Filed Oct. Jan. 19. 2007

Before: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel,* Garland, Brown, Griffith* and Kavanaugh, Circuit Judges, and Edwards, Senior Circuit Judge.

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curium

FOR THE COURT:
Mark J. Langer, Clerk
By: Michael C. McGrail
Deputy Clerk

* Circuit Judges Tatel and Griffith did not participate in this matter.

5 U.S.C. § 551(4)-(6), (13), Definitions

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

5 U.S.C. § 553, Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply–

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except–

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 702, Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 703, Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may

be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704, Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

20 U.S.C. § 1681 (a)-(b), Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, . . .

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one

sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C. § 1682, Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. . . .

20 U.S.C. § 1683, Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial

assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

45 C.F.R. §86.41(a)-(c)(1), Athletics [cf. 34 C.F.R. § 106.41(a)-(c)(1) (same)]

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; . . .

Federal Register, Vol. 44, No. 239, Tuesday, December 11, 1979, Rules and Regulations (44 Fed. Reg. 71,413)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 86

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received.

In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits

EFFECTIVE DATE: December 11, 1979

. . .

SUPPLEMENTARY INFORMATION:

1. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

The Secretary of [of HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will

often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.[]

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.
- Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem, coaching and academic tutoring; assignment

and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.

- Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and
- Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the

athletic interests and abilities of women as well as men on a continuing basis. It required an institution either

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or
- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based

objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditure patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

. . .

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide

equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 88.37(c) and 88.4a(c).

. . .

C. Effective Accommodation of Student Interests and Abilities.

1. The Regulation. The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at ' 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available.

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. The Policy. The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

3. Application of the Policy C Determination of Athletic Interests and Abilities.

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. Application of the Policy - Selection of Sports.

In the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. Non-Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited;

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. Application of the Policy - Levels of Competition.

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. Overall Determination of Compliance.

The Department will base its compliance determination under ' 86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or

c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

. . .

IX. Authority

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612; and 45 CFR Part 86)

Dated December 3, 1979.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education, and Welfare.

Dated December 4, 1979.

Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

<seal> THE ASSISTANT SECRETARY

Jan 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979--both of which followed publication for notice and the receipt, review and consideration of extensive comments--specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics. The three-part test is described in the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the

"three-part test." This test, which has generated the majority of the questions that have been raised about Title IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individual basis and, accordingly, OCR will follow-up on these comments and questions in the context of OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes. The first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part--history and continuing practice--is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part--fully and effectively accommodating interests and abilities of the underrepresented sex--centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the

same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have

suggested, that the three parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions--notwithstanding the long history of discrimination based on sex in athletics programs--to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then--because, for example, part three of the three-part test permits evidence that underrepresentation is caused not by discrimination but by lack of interest--is that underrepresentation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the "quota" criticism would be misplaced. Quotas

are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletic participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding

how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however, that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been OCR's experience, however, that institutions committed to maintaining their men's program have been able to do so--and comply with Title IX--notwithstanding limited athletic budgets. In many cases, OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely, <signed>
Norma V. Cantú, Assistant Secretary for Civil Rights

Jan 16, 1996

CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 Fed. Reg. 71413 et seq. (1979)).[1]

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

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[1] The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. See 44 Fed. Reg. 71413.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. 44 Fed. Reg. at 71418.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in

order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an "overall determination of compliance" is made by OCR, 44 Fed. Reg. 71417, 71418, OCR examines the institution's program as a whole. Thus OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

This Clarification provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered. These examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

THREE-PART TEST – Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program. The Policy Interpretation defines participants as those athletes:

Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

Who are listed on the eligibility or squad lists maintained for each sport, or

Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 Fed. Reg. at 71415.

OCR uses this definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test.

Under this definition, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates.

In determining participation opportunities, OCR includes, among others, those athletes who do not receive

scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete. OCR's investigations reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

OCR's analysis next determines whether athletic opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment.

However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality--for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality--the Policy Interpretation examines whether participation opportunities are "substantially" proportionate

to enrollment rates. Because this determination depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than through use of a statistical test.

As an example of a determination under part one: If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.

As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal--i.e., 50 percent of the participants in its athletic program are female--its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this

situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.

As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

THREE-PART TEST -- Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the

underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.[2]

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Developing interests include interests that already exist at the institution.[3] There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the

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[2] Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.

[3] However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.

institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

OCR will consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program. Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and

coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.

By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and

1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST – Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex – including students who are admitted to the institution though not yet enrolled. Title IX provides that at recipient must provide equal athletic opportunity to its students. Accordingly, the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students.[4]

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these

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[4] However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. See 44 Fed. Reg. 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.

students are, in fact, being fully and effectively accommodated.

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

a) Is there sufficient unmet interest to support an intercollegiate team?

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and

- participation in particular in interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).[5] For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. See 44 Fed. Reg. at 71417. These assessments may use

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[5] While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.

straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

b) Is there sufficient ability to sustain an intercollegiate team?

Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

the athletic experience and accomplishments--in interscholastic, club or intramural competition--of students and admitted students interested in playing the sport;

opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and

if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

c) Is there a reasonable expectation of competition for the team?

Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

competitive opportunities offered by other schools against which the institution competes; and

competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test

requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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THE ASSISTANT SECRETARY

July 11, 2003

Dear Colleague:

It is my pleasure to provide you with this Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.

Since its enactment in 1972, Title IX has produced significant advancement in athletic opportunities for women and girls across the nation. Recognizing that more remains to be done, the Bush Administration is firmly committed to building on this legacy and continuing the progress that Title IX has brought toward true equality of opportunity for male and female student-athletes in America.

In response to numerous requests for additional guidance on the Department of Education's (Department) enforcement standards since its last written guidance on Title IX in 1996, the Department' s Office for Civil Rights (OCR) began looking into whether additional guidance on Title IX requirements regarding intercollegiate athletics was needed. On June 27, 2002, Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics to investigate this matter further, and to report back with recommendations on how to improve the application of the current standards for measuring equal opportunity to participate in athletics under Title IX. On February 26, 2003, the Commission presented Secretary Paige with its final report, "Open to All: Title IX at Thirty," and in addition, individual members expressed their views.

After eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very

broad support throughout the country for the goals and spirit of Title IX. With that in mind, OCR today issues this Further Clarification in order to strengthen Title IX's promise of non-discrimination in the athletic programs of our nation's schools.

Title IX establishes that: "No person in the United States shall, on the basis of sex, be

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

In its 1979 Policy Interpretation, the Department established a three-prong test for compliance with Title IX, which it later amplified and clarified in its 1996 Clarification. The test provides that an institution is in compliance if 1) the intercollegiate- level participation opportunities for male and female students at the institution are "substantially proportionate" to their respective full- time undergraduate enrollments, 2) the institution has a "history and continuing practice of program expansion" for the underrepresented sex, or 3) the institution is "fully and effectively" accommodating the interests and abilities of the underrepresented sex.

First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics. If a school does not satisfy the "substantial proportionality" prong, it would still satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the underrepresented sex, or if "the interests and abilities of the

members of [the underrepresented] sex have been fully and effectively accommodated by the present program." Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.

The transmittal letter accompanying the 1996 Clarification issued by the Department described only one of these three separate prongs - substantial proportionality - as a "safe harbor" for Title IX compliance. This led many schools to believe, erroneously, that they must take measures to ensure strict proportionality between the sexes. In fact, each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that "[i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas."

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.

In the 1996 Clarification, the Department provided schools with a broad range of specific factors, as well as illustrative examples, to help schools understand the flexibility of the three-prong test. OCR reincorporates those factors, as well as those illustrative examples, into this Further Clarification, and OCR will continue to assist schools on a case-by-case basis and address any questions they have about Title IX compliance. Indeed, OCR encourages schools to request individualized assistance

from OCR as they consider ways to meet the requirements of Title IX. As OCR works with schools on Title IX compliance, OCR will share information on successful approaches with the broader scholastic community.

Second, OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams.

Therefore, in negotiating compliance agreements, OCR's policy will be to seek remedies that do not involve the elimination of teams.

Third, OCR hereby advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. At the same time, OCR will also work with schools to assist them in avoiding such sanctions by achieving Title IX compliance.

Fourth, private sponsorship of athletic teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX.

Finally, OCR recognizes that schools will benefit from clear and consistent implementation of Title IX. Accordingly, OCR will ensure that its enforcement practices do not vary from region to region.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a challenge for many academic institutions.

But OCR believes that the three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletic opportunities for students of both sexes.

OCR is strongly reaffirming today its commitment to equal opportunity for girls and boys, women and men. To that end, OCR is committed to continuing to work in partnership with educational institutions to ensure that the promise of Title IX becomes a reality for all students.

Thank you for your continuing interest in this subject.

Sincerely,

Gerald Reynolds

Assistant Secretary for Civil Rights

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COLLEGE SPORTS COUNCIL,
1825 I Street, NW Suite 400
Washington, DC 20009,
NATIONAL WRESTLING COACHES ASSOCIATION,
1976 Auction Road
Manheim, PA 17545,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
110 Lomond Court
Utica, NY 13502,
MARQUETTE WRESTLING CLUB,
600 North Broadway, Suite 300
Milwaukee, Wisconsin 53202,
YALE WRESTLING ASSOCIATION,
2 Stamford Plaza, Suite 1501
281 Tresser Boulevard
Stamford, CT 06901,
JUNIATA WRESTLING CLUB,
RR4, Box 958
Mifflintown, PA 17059,
and
COMMITTEE TO REINSTATE DELAWARE WRESTLING,
2615 Bardell Drive
Wilmington, DE 19808
Plaintiffs,

v.)
DEPARTMENT OF EDUCATION,)
400 Maryland Avenue, SW)
Washington, DC 20202,)
RODERICK R. PAIGE,)
SECRETARY OF EDUCATION,)
400 Maryland Avenue, SW)
Washington, DC 20202,)
in his official and individual capacity,)
KENNETH L. MARCUS,)
ACTING ASSISTANT SECRETARY)
FOR CIVIL RIGHTS)
400 Maryland Avenue, SW)
Washington, DC 20202,)
in his official and individual capacity,)
and)
UNITED STATES OF AMERICA,)
Defendants.)

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The College Sports Council ("CSC"), National Wrestling Coaches Association ("NWCA"), Committee to Save Bucknell Wrestling ("Bucknell Wrestling"), Marquette Wrestling Club ("Marquette Wrestling"), Yale Wrestling Association ("Yale Wrestling"), Juniata Wrestling Club ("Juniata Wrestling"), and Committee to Reinstate Delaware Wrestling ("Delaware Wrestling") seek declaratory and injunctive relief based on the following allegations.

NATURE OF THE ACTION

1. Plaintiffs bring this action to protect athletic opportunities and teams from further elimination at

educational institutions that receive federal financial assistance (hereinafter, "schools") and to end various other forms of ongoing gender-conscious discrimination in athletics. The challenged elimination and other discrimination are the direct and indirect result of the unlawful rules and policies (collectively, hereinafter "rules") that the United States Department of Education ("Education"), Secretary of Education Paige, Acting Assistant Secretary of Education for Civil Rights Marcus, and their predecessor at Education and the United States Department of Health, Education and Welfare ("HEW") issued under the color of implementing Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX").

2. Specifically, Plaintiffs challenge on both substantive and procedural grounds (a) the so-called "Three-Part Test" (which HEW issued as a nonbinding statement of policy in December 1979 and which Defendants purported to elevate to a substantive legal requirement in January 1996 and further modified in July 2003), and (b) related administrative actions in which Defendants have directly or indirectly mandated or authorized schools to engage in gender-conscious discrimination in order to comply with the Three-Part Test.

3. Plaintiffs allege that the Three-Part Test and these related administrative actions constitute a regulatory disparate-impact standard and affirmative-action mandate that Congress did not authorize; that they mandate or authorize the very discrimination that Title IX prohibits; and that they violate constitutional equal-protection guarantees, Title IX's statutory prohibition against gender-based discriminations, and the applicable Title IX rules and regulations. Plaintiffs further allege that the Three-Part Test

and related administrative actions were issued without observing the constitutionally and statutorily required procedures, thereby rendering the Three-Part Test and related administrative actions void *ab initio.*

4. Plaintiffs seek declaratory and injunctive relief to compel Defendants to comply with the civil-rights requirements of the Constitution and Title IX and the rulemaking requirements of both Title IX and the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"). As set forth more fully below, Plaintiffs seek the following declaratory and injunctive relief:

(a) a declaration that the Three-Part Test, the 1996 Clarification, and the 2003 Further Clarification substantively violate the discrimination prohibitions of Title IX and its implementing regulations, as well as the Equal Protection component of the Due Process Clause of the U.S. Constitution;

(b) a declaration that the Three-Part Test, the 1996 Clarification, and the 2003 Further Clarification violate the procedural requirements of the APA and Title IX;

(c) an order vacating Defendants' Three-Part Test, the 1996 Clarification, the 2003 Further Clarification, and any and all guidance implementing those documents and remanding Defendants' Title IX regulations to Defendants for a rulemaking consistent with this Court's substantive holdings in this action and in accordance with a schedule set by this Court; and

(d) an order staying enforcement of all regulatory components of the Title IX athletics rules and regulations that relate to athletic participation and opportunity, sports offered, and levels of competition provided until the Defendants completes the rulemaking ordered by this Court

and the resulting final rule goes into effect pursuant to all applicable procedural requirements.

PARTIES

5. Plaintiffs CSC is a not-for-profit District of Columbia corporation headquartered in Washington, D.C. CSC's institutional members include, without limitation, the College Swimming Coaches Association of America, the United States Track Coaches Association, the National Wrestling Coaches Association, and the College Gymnastics Association. The individuals and organizations that are members of CSC and its member organizations (collectively, "CSC Members") include, without limitation, athletic directors, coaches, student-athletes, athletic associations, fans, booster clubs, parents, save-our-sport groups, and alumni. CSC Members include student-athletes between eighteen and twenty-one years of age. CSC Members have educational, professional, economic, participatory, aesthetic, and spectator interests in intercollegiate athletics at substantially all of the postsecondary schools in the United States that offer intercollegiate (as well as fully funded club) opportunities in swimming, track and field, cross country, wrestling, and men's gymnastics and at hundreds of secondary schools. These interests have been harmed (and continue to be harmed) by the elimination of athletic opportunities and teams that result from schools' efforts to comply with the Three-Part Test.

6. Plaintiff NWCA, incorporated under the laws of Iowa and headquartered in Manheim, Pennsylvania, is a not-for-profit corporation dedicated to the advancement of the sport of wrestling, primarily at the scholastic and collegiate levels. NWCA's members include both individuals (including, without limitation, scholastic and collegiate athletic directors and coaches, student-athletes,

fans, parents, and alumni) and organizations (including, without limitation, athletic associations, booster clubs, and save-our-sport groups). NWCA's members have ongoing legal, educational, professional, economic, and aesthetic interests in collegiate and scholastic wrestling, which interests have been harmed and restricted (and continue to be harmed and restricted) by Defendants' unlawful Title IX rules. Plaintiff NWCA receives membership dues from its members. The number of dues-paying members decreases when institutions (at scholastic or collegiate level) discontinue their wrestling program.

7. Plaintiff Bucknell Wrestling, an unincorporated association of Bucknell University ("Bucknell") alumni and student-athletes, is headquartered in Utica, New York. Bucknell Wrestling is a not-for-profit association dedicated first to lobby Bucknell to abandon its stated plans to eliminate its men's intercollegiate wrestling program in the 2002-03 academic year, then to seek the team's reinstatement, and now to ensure that the team's endowment for the 2005-06 season and beyond suffices to avoid any gender-based discrimination against the team, such as the roster cap that Bucknell intends to impose on the team to comply with Bucknell's overall gender-based roster capping program. Bucknell Wrestling's members have ongoing participatory and spectator interests in the Bucknell wrestling program, which interests have been harmed by (and threaten to be harmed and/or eliminated by) Bucknell's efforts to comply with Defendants' unlawful Title IX rules. Bucknell Wrestling's members include, without limitation, Jacob E. O'Donnell, who wrestled for Bucknell as a freshman in 2001-02 and wants to do so in the 2004-05 and 2005-06 academic years.

8. Plaintiff Marquette Wrestling, an unincorporated association, is headquartered in Milwaukee, Wisconsin. Marquette Wrestling is a not-for-profit association of Marquette University ("Marquette") alumni formed originally to raise funds to support Marquette's wrestling program when Marquette terminated funding after the 1992-93 academic year. For the 1993-94 through 2000-01 academic years, Marquette Wrestling funded the Marquette wrestling program without direct financial support from Marquette. Marquette Wrestling's members have aesthetic interests in bringing wrestling back to Marquette - which eliminated its wrestling program after the 2000-01 season - and such interests have been harmed by (and continue to be harmed by) Marquette's efforts to comply with Defendants' unlawful Title IX rules. After the 1992-93 academic year, Marquette cut the program's funding; between the 1993-94 and 2000-01 academic years, Plaintiff Marquette Wrestling supported the Marquette wrestling program through its private fundraising efforts, without Marquette's financial support.

9. Plaintiff Yale Wrestling, an unincorporated association, is headquartered in Stamford, Connecticut. Yale Wrestling is a not-for-profit association formed to support wrestling at Yale University ("Yale"). Yale Wrestling supports the Yale wrestling club financially and seeks its reinstatement as an intercollegiate varsity sport. Yale Wrestling's members have ongoing participatory and spectator interests in the Yale wrestling program, which interests have been harmed by (and continue to be harmed by) Yale's efforts to comply with Defendants unlawful Title IX rules. At the end of the 1990-91 academic year, Yale decided to demote its intercollegiate varsity wrestling team to "club" status, citing budgetary reasons. To avert this

demotion, Yale Wrestling offered to endow the Yale wrestling program to allow wrestling to continue at Yale despite the budget cuts. On information and belief, Yale declined to accept the endowment because of the Title IX implications of the imbalance in men's and women's participation at Yale. On information and belief (which likely could be proved conclusively after a reasonable opportunity for discovery), the Yale officials with whom the alumni (now members of Yale Wrestling) spoke were referring to the Three-Part Test.

10. Plaintiff Juniata Wrestling, incorporated under the laws of Pennsylvania and headquartered in Mifflintown, Pennsylvania, is a not-for-profit corporation dedicated to the advancement of the sport of wrestling in Juniata County, Pennsylvania, at both the interscholastic level and the open/club levels for all ages. Juniata Wrestling's members include both parents, fans, and alumni, who for themselves and their minor children have ongoing educational and aesthetic interests in both collegiate and scholastic wrestling, which interests have been harmed and restricted (and continue and threaten to be further harmed and restricted) by Defendants' unlawful Title IX rules. Unlike their primarily collegiate co-plaintiffs, Juniata Wrestling exists in a primarily interscholastic environment that has not until recently faced significant threat from the Three-Part Test. Because private interest-groups have attempted to spread the Three-Part Test to the interscholastic level, Juniata Wrestling fears that its interests will face the types of losses seen at the intercollegiate level. Unlike Yale, Bucknell, and Marquette, the principle school district of concern to Juniata Wrestling is a public school district, subject to the 14th Amendment.

11. Plaintiff Delaware Wrestling, an unincorporated association, is headquartered in Newark, Delaware. Delaware Wrestling is a not-for-profit association formed to support the club wrestling team at the University of Delaware ("Delaware") and to seek its reinstatement as an intercollegiate varsity sport. Delaware Wrestling's alumni, fan, and student members have ongoing participatory, spectator, and other aesthetic interests in the Delaware wrestling program, which interests have been harmed by (and continue to be harmed by) Delaware's efforts to comply with Defendants' unlawful Title IX rules. Unlike Yale, Bucknell, and Marquette, Delaware is a state university subject to the 14th Amendment.

12. Defendant United States Department of Education, headquartered in the District of Columbia, is an executive department of the United States government. Defendant Paige is the Secretary of Education. Defendant Marcus is the Acting Assistant Secretary for Civil Rights. Defendants Paige and Marcus are sued in their official capacities and also in their individual capacities for actions taken under color of legal authority. Defendants Paige and Marcus are not sued in their individual capacities for monetary or punitive damages. Congress has empowered Defendants to extend federal financial assistance to educational programs and activities. Defendant United States is the federal sovereign, sued for declaratory relief against its statute and for injunctive relief against its agents.

13. Plaintiffs CSC, NWCA, Yale Wrestling, Bucknell Wrestling, and Marquette Wrestling and Defendant U.S. Department of Education were parties to earlier related litigation. *National Wrestling Coaches Association et al. v. Department of Education,* 263 F.Supp.2d 82 (D.D.C. 2003) ("*NWCA I*"), *aff'd* 366 F.3d 930 (D.C. Cir. 2004)

("*NWCA II*") (petitions for review pending). Plaintiffs Delaware Wrestling and Juniata Wrestling were not parties to that litigation, and neither entity was or now is in privity with, or a member of, a party to that litigation.

14. This First Amended Complaint cites to (and hereby incorporates by reference) documents attached to prior pleadings in the above-captioned action: (1) the original complaint, filed December 19, 2003 ("Original Compl."); and (2) Plaintiff's Response to Court's Show-Cause Order, filed July 7, 2004 ("Pl.'s Resp.").

JURISDICTION AND VENUE

15. This case arises out of Defendants' violation of Sections 901 and 902 of Title IX, 20 U.S.C. §§ 1681, 1682, Section 4 of the APA, 5 U.S.C. § 553, and the Equal Protection component of the Due Process Clause, U.S. CONST. amend. V. Plaintiffs' claims, therefore, raise federal questions and questions of civil rights under acts of Congress, over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), 1361, the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), and D.C. Code § 11-501.

16. The allegations raised herein constitute good cause to expedite this action under Fed. R. Civ. Proc. 57 and 28 U.S.C. § 1657(a).

17. Pursuant to 28 U.S.C. § 1391(e), venue is proper in the District of Columbia, where Defendants are headquartered.

Standing

18. Plaintiffs and their members have suffered injuries fairly traceable to the Three-Part Test and redressable by its repeal. *See* Ex. 1 (declaration of Eric Pearson, Executive Director, College Sports Council, incorporated by reference herein). For professional,

economic, participatory, and aesthetic reasons, Plaintiffs' members who are coaches and student-athletes currently on athletic teams desire to remain with those teams, rather than see them cut or capped. For participatory, economic (in the case of scholarship athletes), and aesthetic reasons, Plaintiffs' members who are student-athletes who have (or will have) athletic eligibility to participate in future seasons desire that teams continue to exist (and that fully funded club teams be elevated to intercollegiate status) in order to meet their athletic interests. For spectator, educational, and other aesthetic reasons (*e.g.*, the pleasure of providing students with opportunities), Plaintiffs' members that are fans, parents, booster clubs, save-our-sport groups, and alumni have supported (and desire and intend to support in the each future season) and have watched and followed (and desire and intend to watch and follow in the each future season) men's athletic teams that either will be cut or have been cut because of the Three-Part Test. The Three-Part Test forces Plaintiffs' members who are coaches or athletic directors to engage in gender-conscious discrimination, and such Plaintiffs' members desire to cease such discrimination.

19. Schools cut teams because of the Three-Part Test. *See, e.g., Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 610-11 (6th Cir. 2002) (in 1999, Miami University eliminated its wrestling, tennis, and soccer teams to comply with Defendants proportionality requirements); *Boulahanis v. Board of Regents*, 198 F.3d 633, 635-36 (7th Cir. 1999) (in or about 1996, Illinois State University eliminated its wrestling and soccer teams to comply with Defendants proportionality requirements). Schools cap teams because of the Three-Part Test. *See, e.g.*, "Want to Try Out for College Sports? Forget It," *New York Times*, A1 (Sept. 22, 2002) (Original Compl. Ex. 7).

20. Although Title IX provides the primary (and possibly only) applicable federal requirement for private schools to avoid gender discrimination in athletics, public schools do not have the option of refusing federal funds (and thus avoiding Title IX) because the 14th Amendment prohibits such public schools from discriminating based on gender. Further, both public and private schools cannot afford to forego federal funds and so would conform their actions to the requirements of Defendants' revised Title IX regulations. *See, e.g., Student Members of SAME v. Rumsfeld,* 2004 WL 1392275, *3 (D. Conn. June 9, 2004) (Yale reverses policy to avoid loss of federal funds); *Freedom Republicans, Inc. v. FEC,* 13 F.3d 412, 417 (D.C. Cir. 1994) (formidable evidence that schools will change policies to avoid termination of federal funding); . Further, by operation of law, the rescission of the Three-Part Test and its implementing guidance would restore the pre-1979 regulatory standard, under which schools must provide opportunity (or ration scarcity) based on interest, which in general benefit men because of their statistically greater interest in athletics. Further, the removal of proportionality's impetus to add new women's sports (*e.g.,* crew, equestrian) would allow schools to maintain their existing programs, without cutting men's sports. Further, and particularly for fully funded club teams, schools could (and in some instances would be required to) reinstate men's varsity teams.

21. Several of Plaintiffs' members face imminent elimination of their teams as the sole result of the Three-Part Test, and in the absence of the Three-Part Test those teams would be secure. Given the number of non-proportional schools, Plaintiffs have had and expect to continue to have

members facing imminent elimination for the foreseeable future unless the Court rescinds the Three-Part Test.

22. Plaintiffs' members include individuals and organizations affiliated with schools that have never been adjudged to have violated Title IX in their athletic departments, schools that have been so adjudged based solely on the Three-Part Test, and schools that have been so adjudged based on factors other than or in addition to the Three-Part Test. Except as specifically provided, the allegations in this Complaint refer to the first category of school, for which gender-conscious remedial measures such as cutting and capping are unlawful under Title IX, the Title IX regulations, and (for public schools) the 14th Amendment. Because the Three-Part Test purports to authorize such otherwise-illegal conduct by schools that continue to receive federal funds, Plaintiffs have standing to challenge the Three-Part Test.

23. In high schools, boys and girls constitute approximately 58 and 42 percent, respectively, of interscholastic athletes. In college (based only on data from schools in the National Collegiate Athletic Association), men and women constitute approximately 58 and 42 percent, respectively, of intercollegiate athletes. In high school, boys and girls each constitute approximately half of the students. In college, men and women constitute approximately 45 and 55 percent, respectively, of full-time undergraduate students. Because of the foregoing disparities in interest and enrollment, the selection of an enrollment-based measure of Title IX compliance injures existing men's teams at non-proportional schools. If these schools were required or allowed to move to an interest-based measure of compliance, Plaintiffs' members on teams that now face imminent cuts or caps would cease to face such threats.

24. Athletic directors and coaches that are members of Plaintiffs and that must engage in intentional discrimination (gender-conscious cutting and capping) in violation of Title IX in order to comply with Defendants' disparate-impact standard (the Three-Part Test) and with Education-negotiated settlements. As the direct and indirect result of Defendants' Three-Part Test, under the euphemism "roster management," Plaintiffs' members have been forced to serve (and continue to be forced to serve) as the involuntary participants who implement Defendants' Three-Part Test by capping athletes solely to achieve the quota established pursuant to the Three-Part Test. At schools that have been adjudged to violate Title IX based solely on the Three-Part Test, Plaintiffs' members who wish to escape the court-imposed gender-conscious remedies would benefit from the Three-Part Test's rescission because it would allow their school or themselves to revisit the consent decrees based on changed circumstances or in a follow-on lawsuit.

25. The Three-Part Test serves as an influential government document that causes schools to take gender-conscious actions (namely, cutting and capping) that they would not take but for the Three-Part Test and which they would cease taking upon the rescission of the Three-Part Test. *See, e.g.*, Ex. 2 (Bucknell press release classifying proportionality as "[t]he key principle" of Title IX).

26. As an *ultra vires* enactment (both substantively and procedurally), the Three-Part Test unlawfully injures Plaintiffs' alumni, booster-club, parent, and fan members by directly impairing their freedom to interact with schools. This phenomenon occurs both when schools refuse these members' offers to fund or endow teams (*e.g.*, Yale, Marquette) and when they demand an offsetting contribution for the other gender's teams to remain in

compliance with proportionality (*e.g.*, Bucknell). In the vast majority of cases, these schools would not refuse a similar offer to fund only a women's team and would not require offsetting payments to a men's team.

27. Most of Plaintiffs' individual members are taxpayers, and Title IX is Spending-Clause legislation. The Three-Part Test and its accompanying guidance have violated (a) the right of Plaintiffs' student members to be free from discrimination and their regulatory right to have their interest considered to the same extent as the other gender's interest, (b) the rights of Plaintiffs' athletic director and coach members to be free from a requirement to discriminate against others, and (c) all members' right to have laws enacted pursuant to bicameralism and presentment and substantive regulations adopted pursuant to notice-and-comment rulemaking, and the violation of such substantive and procedural rights confer standing on Plaintiffs.

28. In general, Plaintiffs and their members have not filed administrative complaints pursuant to Defendants' Title IX regulations to challenge schools' compliance with the Three-Part Test. Filing such complaints would be futile. *See* Ex. 3. In the event that Plaintiffs prevail in this litigation and that schools do not cease gender-conscious cutting and capping or fail to assess the interests of both genders in determining equal athletic opportunity, Plaintiffs and/or their members would file such complaints to attempt to seek voluntary compliance by their schools. Because the administrative-complaint process provides a low-cost alternative (both for the school and for the complainant) to filing a lawsuit, most if not all of Plaintiffs and their members would prefer that process to litigation.

29. The allegations regarding Plaintiffs' standing (Paragraphs 18 through 28) are made to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, which likely could be proved conclusively after a reasonable opportunity for discovery.

No Adequate Remedy

30. This action is not barred by the APA's "adequate-remedy bar," 5 U.S.C. § 704, because Plaintiff CSC cannot sue any entity but Defendants for the denial of CSC's petition to repeal the Three-Part Test (*see* Original Compl. Ex. 2, 3). Further, Plaintiffs' members who are students at schools that cut teams (and thus arguably violated Title IX's statutory provisions) outside the applicable statute of limitations (*e.g.*, Yale, Delaware) have no statutory cause of action against their schools because they had not yet matriculated (standing) and were children (capacity) when the schools ostensibly violated the statute. By contrast, for current and ongoing violations of the regulatory equal-opportunity regulations, such members lack a private right of action. Further, Plaintiffs' members who are alumni, fans, parents, and booster clubs have no private right of action under Title IX's statutory or regulatory provisions. Plaintiffs' members threatened with imminent cuts and caps do not yet have a statutory action against their schools. Finally, even a pre-termination, declaratory-judgment action against a school may not provide an alternate remedy (*e.g.*, the school could deprive a putative plaintiff of a case or controversy merely by agreeing that the Three-Part Test is not in force or effect).

31. Enforcement actions brought against schools do not provide an adequate remedy for student-athletes because schools typically announce cutting and capping decisions in the spring after the deadline for applying to

transfer. Cutting and capping decisions often come after the schools that still may accept transferees for the next year have allocated their scholarships. As a result, when a school makes a cut or announces capping, student-athletes do not have an opportunity to seek other opportunities. Once this Court assumes equitable jurisdiction over a challenge to Defendants' *ultra vires* actions, a legal remedy that subsequently materializes directly against a school does not displace this Court's equitable jurisdiction.

Timeliness of Action

32. This action is timely because (a) as set forth in paragraphs 104 to 114, Defendants fraudulently concealed the nature of its administrative actions; (b) as set forth in paragraphs 104 to 114, Defendants' 2003 Clarification re-opened the Three-Part Test to judicial review, (c) Plaintiffs' members between the ages of eighteen and twenty-one years have a timely action against the Three-Part Test pursuant to 28 U.S.C. § 2401(a) ("The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases"); and (d) Plaintiffs' members include those who have not had "actual and timely notice of the terms" of the 1996 Clarification as the quoted phrase is used in 5 U.S.C. § 552(a)(1)(E); and (e) the Officer Defendants (and their predecessors) have continuously and are currently engaged in ongoing *ultra vires* acts, in violation of Title IX, the Constitution, and the APA, to which the statute of limitation either does not apply or has not run.

IRREPARABLE HARM REQUIRES INJUNCTIVE RELIEF

33. The injunctive and declaratory relief requested in paragraph 163, *infra*, will redress the injuries alleged herein by eliminating Defendants' Three-Part Test and the

safe-harbor provisions of the 1996 Clarification and 2003 Further Clarification, thereby restoring the statute's protections against intentional gender-conscious discrimination, 20 U.S.C. § 1681, and the regulations' requirement that schools provide equal opportunity (not equal participation) based on interest and abilities (not enrollment). 45 C.F.R. § 86.41(c)(1). Injunctive and declaratory relief are necessary to restore the rights of men and women to an equal footing in the allocation of athletic opportunities, to prevent schools from continuing to rely on the Three-Part Test after the Court declares the Test unenforceable by Defendants, and to prevent the loss of further athletic opportunities. Plaintiffs' intangible and aesthetic injuries cannot be redressed by or reduced to money damages.

STATUTORY BACKGROUND

34. Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 ("Title VI"). Like Title VI's prohibition on racial discrimination, 42 U.S.C. § 2000d, Section 901(a) of Title IX broadly prohibits intentional (*i.e.*, purposeful) gender-based discrimination in federally funded educational programs and activities. 20 U.S.C. § 1681(a). For purposes of Title IX, "intentional discrimination" means discriminatory actions taken *because* of a person's gender, not merely *in spite of* that person's gender.

35. Unlike Title VI, Title IX incorporates the anti-quota provision from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j), into Section 901(b), which states *inter alia* that "Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may

exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C. § 1681(b).

36. Like Title VI's rulemaking provision, 42 U.S.C. § 2000d-1, Section 902 of Title IX authorizes and directs "each Federal department and agency . . . empowered to extend Federal financial assistance . . . to effectuate the provisions of section 1681 . . . by issuing rules, regulations, or orders of general applicability." 20 U.S.C. § 1682. Section 902 further states that "No such rule, regulation, or order shall become effective unless and until approved by the President." *Id.*

37. Congress patterned Section 902 on Section 602 of Title VI, 42 U.S.C. § 2000d-1, under which the President must publish his or her approval in the *Federal Register* before the rule, regulation, or order takes effect.

38. On November 2, 1980, President James E. Carter issued Executive Order 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980), which delegated to the Attorney General the presidential authority to approve rules, regulations, and orders and to coordinate the implementation and enforcement of Title IX and other civil rights legislation.

39. On June 3, 1981, Attorney General William French Smith delegated to the Assistant Attorney General in charge of the Department of Justice's Civil Rights Division the implementation and enforcement authority (but not the authority to approve rules, regulations, and orders) that Executive Order 12,250 had delegated to the Attorney General.

40. On February 11, 1984, the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984) (hereinafter, *Grove City*), held that Title IX extended only to the educational programs and activities that directly received federal funds.

41. In the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988) ("CRRA"), Congress prospectively extended the reach of Title IX to all of a school's educational programs and activities if any of the school's educational programs and activities received federal funds.

REGULATORY BACKGROUND

1975 HEW Regulations

42. On June 20, 1974, HEW issued proposed regulations implementing Title IX. 39 Fed. Reg. 22,228 (June 20, 1974). Regarding athletics, the proposal required schools to assess student interest in athletics. The proposed rule did not, however, require equal expenditure for each gender or for each team.

43. On June 4, 1975, HEW issued final regulations implementing Title IX. 40 Fed. Reg. 24,128 (June 4, 1975) (*codified at* 45 C.F.R. §§ 86.1-.71). HEW's regulations regarding athletics, 45 C.F.R. § 86.41, include a three-year phase-in period, 45 C.F.R. § 86.41(d), which expired on July 21, 1978.

44. In the preamble to its final rule, HEW indicated that it eliminated the proposal's requirement to assess student interest because commenters misinterpreted it as a requirement to conduct an annual student poll and to offer teams based on the result of that poll. 40 Fed. Reg. at 24,134. In eliminating that proposed requirement, however, HEW expressed its intent that schools consider the interests of both genders when determining what sports to offer. *Id.*

Further, HEW disavowed an element of the proposed rule that would have required schools to make affirmative efforts to publicize opportunities available to a gender for which athletic opportunity had been limited without discrimination because that proposed requirement would have been "affirmative action" inconsistent with 45 C.F.R. § 86.3. *Id.*

45. The regulation requires schools to provide "equal athletic opportunity for members of both sexes." 45 C.F.R. § 86.41(c). The rule lists ten factors that HEW will consider "among other factors" to determine whether equal opportunities are available. *Id.* The first factor is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes." 45 C.F.R. § 86.41(c)(1). The other nine factors include equality of facilities, equipment, and housing, scheduling of games and practice, dining services, travel, and per diems, publicity, tutors, and access to coaching. *See* 45 C.F.R. § 86.41(c)(2)-(10).

46. Under the regulations as promulgated, "level of competition" refers qualitatively to the type of team offered (*i.e.*, intramural v. club v. intercollegiate/interscholastic varsity; local v. regional v. national) and "selection of sports" refers to the sport offered (*e.g.*, track and field, gymnastics, swimming).

47. President Gerald R. Ford signed and approved the HEW regulation on May 27, 1975, which was published in the *Federal Register*. 40 Fed. Reg. at 24,137.

1979 HEW Policy Interpretation

48. In the months after HEW's phase-in period expired, HEW received approximately 93 complaints against approximately 62 colleges and universities and, on December 11, 1978, HEW's Office for Civil Rights issued a

proposed "policy interpretation" as a framework for resolving the complaints. 43 Fed. Reg. 58,070, 58,071 (Dec. 11, 1978).

49. HEW recognized that differences in athletic interests between genders could cause participation rates to differ, even at schools that provide equal opportunity. *See* 43 Fed. Reg. at 58,072 ("Intercollegiate athletic programs that provide *equal opportunities* for both sexes may offer different sports, and have *different participation rates* and varying competition opportunities for men and for women, because their interests and abilities may be different") (emphasis added).

50. In early April 1979, HEW's General Counsel opined that the forthcoming Title IX "Policy Interpretation" must meet certain the procedural requirements of the General Education Provisions Act ("GEPA"). *See* Pl.'s Resp. Ex. 1 ("Libassi Opinion"); *see also id.* Ex. 2, at 1 ("If we go too far in the other direction and claim this policy statement is a 'rule' of general applicability[,] it would have to be approved by the President") ("Libassi Memorandum"); *accord id.* Ex. 3 (exchange between White House and HEW Secretary on unrelated Title IX issue) (rule change requires presidential approval). Because of congressional and public interest in the issue, the HEW Secretary shared the Libassi Opinion with Congress and the public. *See, e.g., id.* f 4-5.

51. Because HEW staff wished to avoid the political ramifications and potential delay of submitting the Policy Interpretation to Congress, however, internal HEW stakeholders lobbied for releasing the Policy Interpretation without complying with GEPA. *See id.* Ex. 6 ("Martel Memorandum"). As part of this effort, an Associate General Counsel prepared an opinion that justified not submitting the Policy Interpretation to Congress and not seeking

presidential approval. *See* Compl. Ex. 4, pp. 36-42 ("Hamlin Memorandum"). The Hamlin Memorandum concludes that the Policy Interpretation is nonbinding, but needs revisions to revise the "potentially misleading and, in [his] view, incorrect language" that "may make it appear that this document imposes new legal requirements." Compl. Ex. 4, pp. 36-37.

52. As particularly relevant here, one of the post-Hamlin revisions moves the Three-Part Test from an interpretation of the "interests and abilities" to an application of the subsidiary policy to consider levels of competition, including the opportunity for team competition. *Compare* Pl.'s Resp. Ex. 7, Attachment, at 12 ("Tatel Memorandum") *with* 44 Fed. Reg. at 71,418. In addition, the post-Hamlin revision adds preamble language that the Policy Interpretation "does not contain a separate section on institutions' future responsibilities[,] . . . institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available." 44 Fed. Reg. 71,414; *see* Tatel Memorandum, at 32 (preamble language not present in pre-Hamlin draft). In summary, the Hamlin Memorandum takes the position that the 1979 Policy Interpretation is not an "interpretation" and does not bind regulated parties. Hamlin Memorandum, at 4 (Compl. Ex. 4, p. 39).

53. Further, the Hamlin Memorandum provides that "failure to meet the [Policy Interpretation] compliance factors does not constitute proof that an educational institution violated Title IX." *Id.* Moreover, in trying to avoid classification as a binding rule, HEW expressly eschewed the argument that the notice and comment it

provided the public on the policy interpretation somehow satisfies the APA's notice-and-comment rulemaking requirements. Compl. Ex. 4, pp. 40, 42 n.*. Like her predecessor with the Libassi Opinion, the new HEW Secretary shared the Hamlin Memorandum with the Congress and the public. *See, e.g.*, Pl.'s Resp. Ex. 8 (letter to Congress); Pl.'s Resp. Ex 9 ("HEW Policy Lacks Force of Law," The NCAA News, 1, 5 (Jan. 31, 1980)).

54. On December 11, 1979, HEW issued its policy interpretation. 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) ("1979 Policy Interpretation").

55. HEW neither intended nor considered its 1979 Policy Interpretation (including the Three-Part Test) to constitute a "generally applicable rule, regulation, guideline, interpretation, or other requirement" that would bind either the agency or the public, and expressly so indicated in justifying the agency's failure to seek President Carter's signature and to submit the 1979 Policy Interpretation to Congress under the General Education Provisions Act. *See* Original Compl. Ex. 4, at 8, 36-42 (HEW memorandum requesting that Secretary Patricia Roberts Harris approve the 1979 Policy Interpretation). Secretary Harris approved and signed the 1979 Policy Interpretation based on this HEW memorandum.

56. The 1979 Policy Interpretation did not go through notice-and-comment rulemaking for purposes of Section 4 of the APA, 5 U.S.C. § 553(b)-(c), and HEW eschewed any suggestion that the public comment that HEW sought on its proposed policy interpretation somehow rendered the final 1979 Policy Interpretation anything more than a nonbinding proposal on how the agency may act in the future.

57. The 1979 Policy Interpretation was "designed specifically for intercollegiate athletics" but states that "its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation." 44 Fed. Reg. 71,413.

58. The 1979 Policy Interpretation's guidance on "equal athletic opportunity" consists of an "Overall Determination of Compliance" and three specific sections captioned: (1) determination of interests and abilities; (2) selection of sports; and (3) selection of the level of competition. 44 Fed. Reg. at 71,417-18.

59. The "Overall Determination of Compliance" contains the following three criteria:

(a) whether a school's policies are discriminatory in language or effect;

(b) whether the school's program as a whole includes substantial and unjustified disparities in the opportunities or treatment afforded to male and female athletes; and

(c) whether segments of the school's program include disparities in the treatment and opportunities that are substantial enough to deny equality of athletic opportunity.

60. With regard to assessing interests and abilities, the 1979 Policy Interpretation allows schools to assess students' athletic interests and abilities by any non-discriminatory method, provided that:

(a) the process takes into account the nationally increasing levels of women's interests and abilities;

(b) the methods do not disadvantage the members of the underrepresented gender;

(c) the methods of determining ability consider team performance records; and

(d) the methods are responsive to the expressed interests of students of the underrepresented gender capable of intercollegiate competition.

61. With regard to selecting sports, the 1979 Policy Interpretation does not require schools to integrate teams or to field male and female teams in all sports. Under the 1979 Policy Interpretation, however, if a school excludes a gender from a contact sport, it must also field a team for the excluded gender if opportunities have been limited and there is sufficient interest to support a viable team with a reasonable expectation of intercollegiate competition. For a non-contact sport, the school must field a team for the excluded gender if that gender has insufficient skill to compete on an integrated team, opportunities have been limited for that gender, and there is sufficient interest to support a viable team with a reasonable expectation of intercollegiate competition.

62. The 1979 Policy Interpretation does not require schools to upgrade teams to intercollegiate status absent a "reasonable expectation" that intercollegiate competition will be available in the school's normal competitive region. When opportunities for a gender have been limited, however, the 1979 Policy Interpretation may require the school to encourage development of competition in the region.

63. As signaled in the text of the 1979 Policy Interpretation, 44 Fed. Reg. at 71,417, HEW used its "other factor" authority to create a new (quantitative) factor that it describes as "equal competitive opportunity" in its internal memorandum, Original Compl. Ex. 4, at 16, and as "levels of

competition including the opportunity for team competition" in the 1979 Policy Interpretation, 44 Fed. Reg. at 71,417.

64. As an application of HEW's policy to consider this new factor, the 1979 Policy Interpretation sets forth a three-part test to assess compliance with this level-of-competition component of "equal athletic opportunity":

(a) whether the school provides intercollegiate "participation opportunities" in numbers substantially proportionate to enrollment;

(b) if not, whether the school can show a continuing history of expansion that is demonstrably responsive to the developing interest of the underrepresented gender; and

(c) if not, whether the school can show that the interests and abilities of the underrepresented gender are "fully and effectively accommodated."

This component of the 1979 Policy Interpretation is known as the "Three-Part Test." As a mere application of a non-prospective and non-binding policy, the Three-Part Test is not itself a "general principle" of the 1979 Policy Interpretation.

65. No President (before November 2, 1980) or Attorney General (after November 2, 1980) has approved the 1979 Policy Interpretation pursuant to 20 U.S.C. § 1682 and Executive Order 12,250. *See* paragraphs 37-39, *supra.*

Formation of Education and the 1980 Education Regulations

66. The Department of Education Organization Act of 1979, Pub. L. No. 96-88, 93 Stat. 668 (Oct. 17, 1979), created Defendants from certain educational components of HEW, with the remaining components of HEW renamed the

Department of Health & Human Services ("HHS"). 20 U.S.C. § 3508(b).

67. HEW never enforced the Three-Part Test or any of the 1979 Policy Interpretation against *any* school, either at the collegiate or scholastic level. Instead, after issuing the Policy Interpretation, HEW began work on what became the 1980 investigator's manual, which HEW determined it must complete before beginning enforcement. HEW passed that task uncompleted to the new Department of Education in May 1980. Education completed the task in the summer of 1980.

68. After the creation of Defendants as a separate agency, Defendants promulgated the education-related regulations previously issued by HEW and other agencies as the Education title of the *Code of Federal Regulations.* 45 Fed. Reg. 3082 (May 9, 1980). HHS, the non-Education portion of former HEW, retained its own Title IX regulations. *See* 45 C.F.R. § 86.1-.71. Defendants' Title IX regulations mirror the HEW/HHS regulations, with the names of the relevant offices and departments changed (*e.g.*, replacing HEW with Education).

69. No President (before November 2, 1980) or Attorney General (after November 2, 1980) has approved the 1980 Education regulations pursuant to 20 U.S.C. § 1682 and Executive Order 12,250. *See* paragraphs 37-39, *supra.*

70. Defendants prepared enforcement manuals in 1980 and 1990, but neither published them in the *Federal Register* nor sought or received approval from the Office of the Federal Register to incorporate them by reference in the *Federal Register.*

71. No President (before November 2, 1980) or Attorney General (after November 2, 1980) has approved the 1980 or 1990 enforcement manuals pursuant to 20 U.S.C.

§ 1682 and Executive Order 12,250. See paragraphs *37-39, supra.*

1996 Clarification

72. On May 9, 1995, the House Subcommittee on Postsecondary Education, Training and Life-long Learning of the Economic and Educational Opportunities Committee held a hearing on Title IX and the Three-Part Test.

73. On June 7, 1995, 142 Members of Congress wrote the Assistant Secretary of Civil Rights expressing wide agreement in Congress that Defendants' Office for Civil Rights needed to issue a revised policy interpretation because, contrary to the legislative intent behind Title IX, the Three-Part Test was causing schools to eliminate men's athletic opportunities to achieve proportionality, without corresponding increases in women's athletic opportunities.

74. On September 20, 1995, Defendants issued a memorandum proposing to clarify the 1979 Policy Interpretation. "Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test" (Sept. 20, 1995) (*transmitted by* Letter from Norma V. Cantú, Assistant Secretary, Office for Civil Rights, Department of Education (Sept. 20, 1995)).

75. On October 2, 1995, Defendants published a notice in the *Federal Register* announcing the availability of the draft clarification (without publishing it) and soliciting "public comment on whether the draft Clarification provides adequate clarity in areas that have generated questions." 60 Fed. Reg. 51,460 (Oct. 2, 1995).

76. By letter dated October 20, 1995 (Original Compl. Ex. 5), NWCA commented that the Three-Part Test violated Title IX and the Constitution and failed to address changed circumstances between the 1970s and the 1990s.

77. On January 16, 1996, the Defendants issued its "Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test" (Jan. 16, 1996) (*transmitted by* Letter from Norma V. Cantú, Assistant Secretary, Office for Civil Rights, Department of Education (Jan. 16, 1996)) ("1996 Clarification"). Education's press release announcing the 1996 Clarification (Original Compl. Ex. 6) characterized the 1996 Clarification as identifying "legal obligations."

78. The 1996 Clarification acknowledges receipt of comments suggesting that the 1979 Policy Interpretation "provided more protection for women's sports than intended by Title IX" but dismissed those comments because "it would not be appropriate to revise the 1979 Policy Interpretation."

79. The 1996 Clarification asserts that the proportionality prong of the Three-Part Test is a "safe harbor" for complying with the equal opportunity provisions of the regulations, but that schools are free to choose to comply with the other two tests.

80. In the 1996 Clarification, Defendants stated that it will count athletes - as opposed to unfilled opportunities on teams - when it assesses the proportionality of participation opportunities: "OCR [*i.e.*, the Office for Civil Rights] must, however, count actual athletes because participation opportunities must be real, not illusory."

81. The 1996 Clarification announces Defendants' position on capping: "The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test." ("Capping" means placing an artificially low limit on the number of participants on a team to achieve gender proportionality across teams.)

82. The 1996 Clarification was Defendants' first public announcement that Defendants had extended the Three-Part Test to interscholastic athletic programs. In a contemporaneous sworn statement to this Court, Defendants' HEW predecessors advised the Court that HEW would not apply the 1979 Policy Interpretation's "interest-and-abilities" provisions to interscholastic athletics, *see* Ex. 4 (Declaration of Cynthia G. Brown, Ex. I, at 20, Tab G, at 1-2).

83. The 1996 Clarification was Defendants' first post-*Grove City* public announcement that the Three-Part Test applied generally to athletic departments that do not directly receive federal funds.

84. The third prong of the Three-Part Test described in the 1996 Clarification differs from that described in Defendants' 1980 Title IX Intercollegiate Athletics Investigator's Manual. Specifically, in 1980, Defendants interpreted prong three to mean that a school must accommodate the underrepresented gender's interest "to the same degree that it accommodates the interests . . . of the other gender." During the 1980s, Defendants interpreted and enforced prong three consistently with its 1980 manual, under a comparative analysis that included whether a college offered intercollegiate sports for men and women in the same proportion to the interscholastic sports offered to boys and girls. In the 1996 Clarification, Defendants changed the inquiry of prong three to whether the underrepresented gender has "(a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team," without considering the relative accommodation of the other gender's interest.

85. Defendants neither published the 1996 Clarification in the *Federal Register* nor sought or received approval from the Office of the Federal Register to incorporate the 1996 Clarification (or the September 20, 1995 draft clarification) by reference in the *Federal Register.*

86. In the 1995-96 Clarification process, Defendants did not follow any procedure that Defendants previously had published in the *Federal Register* pursuant to 5 U.S.C. § 552(a)(1)(C).

87. No President or Attorney General has approved the 1996 Clarification pursuant to 20 U.S.C. § 1682 and Executive Order 12,250. *See* paragraphs 37-39, *supra.*

2003 Further Clarification and Petition Denial

88. On January 10, 2003, CSC filed a petition to repeal the Three-Part Test. Original Compl. Ex. 2. On July 11, 2003, Defendants issued "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance" (July 11, 2003) ("2003 Further Clarification"). Ex. 3.

89. In its 2003 Further Clarification, Defendants *inter alia* claims that the 1979 Policy Interpretation "established a three-prong test for compliance with Title IX, which [Defendants] later amplified and clarified in its 1996 Clarification" and elevates the Three-Part Test's second and third prongs to safe-harbor status, parallel with the 1996 Clarification's elevation of the Three-Part Test's first prong.

90. In its 2003 Further Clarification, Defendants "advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply."

91. Defendants did not issue its 2003 Further Clarification pursuant to any procedure that Defendants

previously had published in the *Federal Register* pursuant to 5 U.S.C. § 552(a)(1)(C).

92. No President or Attorney General has approved the 2003 Further Clarification pursuant to 20 U.S.C. § 1682 and Executive Order 12,250. *See* paragraphs 37-39, *supra.*

93. By letter dated July 28, 2003 (Original Compl. Ex. 3), Defendants advised CSC that Defendants had denied CSC's petition.

Status of 1979 Policy Interpretation (and Three-Part Test) as Nonbinding Policy Statement

94. With regard to athletic scholarships, the 1979 Policy Interpretation indicates that, when schools provide athletic scholarships, the total amount of scholarship aid by gender must be substantially proportional to the genders' participation rates in intercollegiate athletics. Defendants' 1980 enforcement manual (page 29) provides that "'substantially proportional' is not a fixed number or percent," but notes that a two-percent gap between participation and scholarships is substantially proportional, whereas a fifteen-percent gap is not. Defendants' 1990 enforcement manual (page 19) directs inspectors to use a 95% confidence interval to evaluate whether a six-percent gap is substantially proportional. Defendants' July 23, 1998

"Dear Colleague" letter indicates that a one-percent gap creates a "strong presumption" of noncompliance. In summary, for more than fifteen years, a two-percent gap and (in most cases[1]) a six-percent gap were "substantially proportional," and thus complied with Title IX, until Defendants suddenly determined (by memorandum) that they presumptively violated Title IX.

95. With regard to athletic recruiting and support services, the 1979 Policy Interpretation acknowledges adding these factors to the regulatory list under the agency's regulatory authority to consider "other factors" beyond the regulatory list. 44 Fed. Reg. at 71,415.

96. Although not the subject of this litigation, the foregoing paragraphs 94 through 95 establish for additional provisions of Defendants' Title IX regime the same conclusion that this Complaint establishes for the Three-Part Test: Defendants have changed the Title IX regime at will, without following procedural requirements of Title IX or the APA.

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[1] Applying standard statistical methods to a typical athletic department would place a six-percent gap within the 95-percent confidence interval.

Effects from the Enforcement of the Three-Part Test

97. Defendants have conducted the inspection, enforcement, and oversight of intercollegiate and interscholastic athletics using the 1979 Three-Part Test, as revised by the 1996 Clarification, and 2003 Further Clarification.

98. Defendants have initiated investigations at schools where athletic participation rates did not match enrollment rates by gender, but where no student had alleged discrimination.

99. Pursuant to the Three-Part Test, as revised by the 1996 Clarification and 2003 Further Clarification, Defendants have negotiated and monitored compliance agreements with schools. Because of such actions, the schools reduced male participation opportunities through gender-conscious cutting and capping of men's athletic opportunities.

100. Defendants' Three-Part Test directly and indirectly has reduced (and continues to limit and to reduce) participation opportunities for male athletes.

101. Based on actions taken by Defendants and their predecessors, schools reasonably interpret the Three-Part Test as a binding requirement.

102. Seeking to avoid Defendants enforcement actions, schools have limited male participation opportunities to comply with Defendants' Three-Part Test. As a direct and indirect result of Defendants' Three-Part Test, schools have cut hundreds of men's teams and have capped hundreds of men's participation opportunities.

103. Based on national and regional statistics on interscholastic and intercollegiate athletic participation, *e.g.*, National Federation of State High School Associations, *Handbook 2003-04* (2003); National Collegiate Athletic

Association, *1982-2003 Sports Sponsorship and Participation Report* (2004), most of Plaintiffs' members (including without limitation members in Bucknell Wrestling, Yale Wrestling, Marquette Wrestling, and Delaware Wrestling) can show statistically that athletic interest for their sport in the geographic areas comprising their school's primary market for students exceeds the athletic interest of various women's sports sponsored by their schools. Accordingly, upon rescission of the Three-Part Test and the resulting reversion to the interest-based prior regulatory standard, most of Plaintiffs members would have a significantly better chance of their school's retaining their sport or arguing for its reinstatement, particularly where the funds were provided to the school.

TIMELINESS OF ACTION AGAINST THREE-PART TEST

104. An agency "re-opens" a prior action to challenge when it changes its interpretation of that prior action. An agency "constructively re-opens" an administrative action previously closed to judicial review when a subsequent action "changes the stakes" of the earlier action. Further, agencies have an "everpresent duty to insure that their actions are lawful."

105. In the 1979 Policy Interpretation, by its terms, the Three-Part Test was a tentative, nonbinding *application* of a tentative, nonbinding *policy* to consider intercollegiate participation opportunities as an "other factor" in future HEW adjudications of administrative complaints pending more than twenty years ago. The 1996 Clarification purports to elevate the Three-Part Test to a legal obligation for all prospective Title IX compliance, thereby reopening the Three-Part Test for judicial review.

106. Defendants' 1996 Clarification declares that the Three-Part Test's first prong (proportionality) provides a "safe harbor," under which schools lawfully may cut or cap men's teams to achieve gender proportionality with enrollment rates. By authorizing schools to use the Three-Part Test's first prong as a "safe harbor" for Title IX compliance, even to the point of violating the anti-discrimination and equal-opportunity provisions of the Overall Determination of Compliance, the Constitution, Title IX, and the implementing Title IX regulations, Defendants' 1996 Clarification reopened the 1979 Policy Interpretation to judicial review by revealing an aspect of the Three-Part Test that was unforeseeable (or simply not present) in 1979.

107. Although the Three-Part Test in the 1979 Policy Interpretation refers to "participation opportunities," Defendants' 1996 Clarification declares that schools must compare the gender ratio of "participants" when seeking to demonstrate gender proportionality under the Three-Part Test. Accordingly, Defendants' 1996 Clarification revealed an aspect of the Three-Part Test that was unforeseeable in 1979, thereby reopening the 1979 Policy Interpretation to judicial review.

108. Although the Three-Part Test in the 1979 Policy Interpretation did not apply by its terms to interscholastic athletic programs (*see also* Ex. 4) and neither the 1995 draft clarification nor the final 1996 Clarification published any data or made any findings that discrimination even exists at the interscholastic level, the 1996 Clarification extends the scope of the Three-Part Test to interscholastic athletics. Accordingly, Defendants' 1996 Clarification revealed an aspect of the Three-Part Test that

was unforeseeable in 1979, thereby reopening the 1979 Policy Interpretation to judicial review.

109. Although Defendants previously memorialized and followed an interpretation of the Three-Part Test's third prong (fully accommodating the interests of the underrepresented gender) that required accommodating the underrepresented gender's interest to the same extent as the school accommodated the other gender's interest, the 1996 Clarification changed the analysis to one based solely on the accommodation of the interests of the underrepresented gender, without regard for the degree of accommodation of the other gender. Accordingly, Defendants' 1996 Clarification changed the interpretation of an aspect of the Three-Part Test, thereby reopening the 1979 Policy Interpretation to judicial review.

110. Defendants' 2003 Further Clarification declares that the Three-Part Test's second and third prongs also provide a "safe harbor," which would allow a school to eliminate any part of its men's athletic program, provided that the school shows progress to meeting the interests of the underrepresented gender or fully accommodates the underrepresented gender. By authorizing schools to do so, Defendants' 2003 Further Clarification reopened the 1979 Policy Interpretation to judicial review by revealing an aspect of the Three-Part Test that was unforeseeable (or simply not present) in 1979.

111. Under the APA, Defendants had an obligation to publish a proposed rule that described the subjects and issues involved. Although Defendants published a *Federal Register* notice announcing the availability of the draft clarification, that notice did not indicate that Defendants intended to elevate a non-prospective, nonbinding, tentative policy into a substantive and prospective legal requirement.

112. In the prior litigation of this matter, Defendants affirmatively misrepresented the procedural history and legal status of its 1979 Policy Interpretation. Similarly, Defendants have affirmatively misrepresented the procedural history and legal status of the 1979 Policy Interpretation in testimony to Congress and elsewhere, public statements, *amicus curiae* briefs (with the Department of Justice), and on its internet site.

113. Litigants and panels in eight other U.S. courts of appeal have reviewed the Three-Part Test without either discussing either the APA rulemaking argument or the procedural history referenced in this Complaint.

114. Plaintiffs' members born within six years of HEW's issuing the 1979 Policy Interpretation have a cause of action against the Three-Part Test. Plaintiffs' members who were minors at the time of any subsequent actions related to the Three-Part Test have a cause of action against such subsequent actions. Such causes of action are timely filed within three years of the date when such Plaintiffs' members attain the age or majority.

I.

DEFENDANTS' TITLE IX RULES UNLAWFULLY ESTABLISH A DISPARATE-IMPACT STANDARD AND UNLAWFULLY AUTHORIZE INTENTIONAL DISCRIMINATION

115. Plaintiffs incorporate paragraphs 1 through 114 as if fully set forth herein.

116. Title IX prohibits only intentional gender-based discrimination.

117. As a federal department empowered to extend federal financial assistance to educational programs and activities, Defendants have a nondiscretionary duty to

promulgate rules to effectuate Title IX's prohibition of intentional gender discrimination. 20 U.S.C. § 1682.

118. Title IX does not authorize Defendants to create (by rule) a generally applicable disparate-impact standard or affirmative-action requirement.

119. The Three-Part Test violates Title IX, the implementing regulations, the Equal Protection component of the Due Process Clause, and the Equal Protection Clause of the 14th Amendment by requiring those schools where men are more interested than women in athletics to discriminate against male student-athletes in one or more of the following ways:

(a) allocate athletic opportunities based on enrollment, which provides men with fewer athletic opportunities than it provides to women, vis-à-vis the genders' respective athletic interest;

(b) continually expand athletic opportunities for women far beyond the level of opportunities provided to men, vis-à-vis the genders' respective athletic interest; and/or

(c) "fully" accommodate the athletic interests of women notwithstanding that the school does not also fully accommodate the athletic interests of men.

120. Title IX does not authorize Defendants to issue a rule authorizing schools to engage in intentional gender discrimination – such as gender-conscious cutting or capping – to achieve compliance with a generally applicable disparate-impact standard or affirmative-action requirement. Title IX and the implementing regulations authorize such gender-conscious remedies only by schools adjudged to have violated Title IX's statutory prohibition against intentional gender-based discrimination in the provision of athletic opportunities.

121. Defendants failed to identify any "important government objective" served by gender-conscious cutting and capping to bring athletic participation into proportion with enrollment rates.

122. Capping a male athlete off a team or cutting an entire men's team because not enough female students elect to participate in the available opportunities violates the Equal Protection Clause of the Fourteenth Amendment, Title IX, Title IX's implementing regulations, and the Overall Determination of Compliance.

123. Defendants' authorizing such capping and cutting violates the Equal Protection component of the Due Process Clause, Title IX, Title IX's implementing regulations, and the Overall Determination of Compliance.

124. For the foregoing reasons, the Three-Part Test, 1996 Clarification's authorization of gender-conscious cutting and capping, and the safe-harbor provisions of the 1996 Clarification and 2003 Further Clarification violate Title IX, the implementing regulations, and the U.S. Constitution.

II.
THE "THREE-PART TEST" UNLAWFULLY BASES COMPLIANCE ON ENROLLMENT RATHER THAN ATHLETIC INTEREST

125. Plaintiffs incorporate paragraphs 1 through 114 and paragraphs 115 through 124 as if fully set forth herein.

126. Notwithstanding that Title IX incorporates anti-quota language in 20 U.S.C. § 1681(b), and that the Title IX regulations require schools to assess students' athletic interests "by a reasonable method [the school] deems appropriate" and to provide equal athletic opportunity, Defendants' Three-Part Test uses (and requires the use of) enrollment as the measure of student interest.

127. When otherwise allowed by law, a disparate-impact or equal-opportunity standard requires comparison with the qualified applicant pool, not the general population. Assuming for the sake of argument that Title IX authorizes Defendants to adopt such regulatory standards, Defendants must compare (and must require recipients to compare) athletic opportunities to the students actually interested in participating in athletics, not to all enrolled students.

128. For the foregoing reasons, the Three-Part Test, the 1996 Clarification, and the 2003 Further Clarification violate Title IX, the implementing regulations, and the U.S. Constitution.

III.
DEFENDANTS UNLAWFULLY DENIED PETITION TO REPEAL THE "THREE-PART TEST"

129. Plaintiffs incorporate paragraphs 1 through 114, paragraphs 115 through 124, and paragraphs 125 through 128 as if fully set forth herein.

130. The APA authorizes any interested person to petition an agency to adopt, amend, or repeal a rule. 5 U.S.C. § 553(e). (By its terms, the APA exemption for "interpretative rules, general statements of policy, or rules of agency . . . practice," 5 U.S.C. § 553(b)(A), applies to "this subsection" (*i.e.*, to § 553(b)), not to all of § 553.)

131. On January 10, 2003, Plaintiffs CSC petitioned Defendants to repeal the Three-Part Test and related agency actions.

132. As set forth in CSC's petition, the Three-Part Test exceeds Defendants' authority and violates constitutional, statutory, and regulatory provisions prohibiting gender-conscious discrimination and requiring equal opportunity.

133. As reinterpreted by Defendants, the Three-Part Test is an affirmative-action mandate designed to remedy perceived discrimination in postsecondary education, all premised on incomplete data from intercollegiate athletics programs circa 1978.

134. Even when authorized by Congress, such affirmative-action plans can last no longer than the specific discrimination they are designed to remedy, and regulatory affirmative-action mandates require evidence of discrimination.

135. In its 2003 Further Clarification and by letter dated July 28, 2003, Defendants both constructively and actually denied CSC's Petition. In denying the petition, Defendants not only exceeded its legal authority, but also did so without any evidence of discrimination to justify Defendants' continuing the Three-Part Test, even if it had the legal authority to do so.

136. For the foregoing reasons, by expressly denying a petition to amend or repeal the Three-Part Test and related agency actions, Defendants' denial constitutes final agency action that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

IV.

DEFENDANTS' 1996 CLARIFICATION UNLAWFULLY SIDESTEPPED QUESTIONS ON DEFENDANTS' LEGAL AUTHORITY FOR THE THREE-PART TEST AND THE WISDOM OF THE THREE-PART TEST AS A MEASURE FOR TITLE IX COMPLIANCE

137. Plaintiffs incorporate paragraphs 1 through 114, paragraphs 115 through 124, paragraphs 125 through 128, and paragraphs 129 through 136 as if fully set forth herein.

138. Defendants' 1996 Clarification acknowledges that many commenters requested Defendants to amend or repeal the Three-Part Test because the Three-Part Test exceeds the intent of Title IX. In addition, NWCA advised Defendants that the Three-Part Test violates the Constitution and should be repealed or amended to reflect changed circumstances between the 1970s and 1990s.

139. In the 1996 Clarification, Defendants justified its decision to summarily ignore these comments by noting that "it would not be appropriate to revise the 1979 Policy Interpretation." In its 1996 Clarification, however, Defendants profoundly revised the 1979 Policy Interpretation, to the point of requiring notice-and-comment rulemaking. As such, Defendants had no authority to evade or avoid questions about its legal authority or the rationality of the Three-Part Test.

140. For the foregoing reasons, Defendants' 1996 Clarification is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

V.

THE THREE-PART TEST, 1996 CLARIFICATION, AND 2003 FURTHER CLARIFICATION ARE NOT IN EFFECT

141. Plaintiffs incorporate paragraphs 1 through 114, paragraphs 115 through 124, paragraphs 125 through 128, paragraphs 129 through 136, and paragraphs 137 through 140 as if fully set forth herein.

142. Under 20 U.S.C. § 1682 and Executive Order 12,250, no rule, regulation, or order of general applicability issued by a federal agency under Title IX takes effect until approved by either the President (before November 2, 1980) or the Attorney General (after November 2, 1980) and such approval is published in the *Federal Register*.

143. No President or Attorney General has approved the 1979 Policy Interpretation, the Defendants' implementing regulations, 34 C.F.R. § 106.1-.71, the 1996 Clarification, or the 2003 Further Clarification pursuant to 20 U.S.C. § 1682 and Executive Order 12,250.

144. For the foregoing reasons, the 1979 Policy Interpretation, the 1996 Clarification, and the 2003 Further Clarification have no force or effect.

VI.

THE 1996 CLARIFICATION VIOLATED THE APA'S NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS

145. Plaintiffs incorporate paragraphs 1 through 114, paragraphs 115 through 124, paragraphs 125 through 128, paragraphs 129 through 136, paragraphs 137 through140, and paragraphs 141 through 144 as if fully set forth herein.

146. Before an agency lawfully can issue a substantive rule, the APA requires the agency to publish a notice of proposed rulemaking in the *Federal Register* and to provide an opportunity to comment. 5 U.S.C. § 553(b)-(c).

147. The APA exempts "interpretative rules, general statements of policy, or rules of agency . . . practice" from the notice-and-comment rulemaking requirement. 5 U.S.C. § 553(b)(A).

148. The APA requires a new notice-and-comment rulemaking to add specific new regulatory factors to an existing substantive rule's enumeration of regulatory factors, notwithstanding that the existing substantive rule allows the agency to consider "other factors" on a case-by-case basis.

149. When an administrative action (a) creates the basis either for enforcement action or for agency action to

confer benefits, or (b) effectively amends a prior substantive rule or regulatory interpretation, the administrative action constitutes a substantive rule and thus requires notice-and-comment rulemaking.

150. As set forth in paragraph 105, *supra*, by its original terms, the Three-Part Test did not apply prospectively to schools' future compliance, but instead served only as HEW's nonbinding proposed framework for resolving the nearly 100 administrative complaints pending in 1979. By elevating the 1979 Three-Part Test to a "legal obligation" for Title IX compliance in 1996 (and prospectively thereafter), Defendants amended the 1979 Policy Interpretation and the implementing Title IX regulations, without the APA-required rulemaking. (In the event that the original Three-Part Test was (or became) binding on the agency or the public, the original Three-Part Test would violate the APA's rulemaking requirements for the same reasons that Plaintiffs alleges that the 1996 Clarification violates those requirements.)

151. The 1979 Policy Interpretation's Three-Part Test asks, in part, whether a school provides intercollegiate "participation opportunities" in numbers substantially proportionate to enrollment. In the 1996 Clarification, Defendants amended the 1979 Policy Interpretation from counting available "participation opportunities" (*i.e., spots* on a team) to counting "participants" (*i.e., athletes* on a team) when determining whether a school complies with the gender-proportionality prong of the Three-Part Test.

152. By its terms and HEW's own contemporaneous assertions to this Court (Ex. 4), the 1979 Three-Part Test did not apply at all to interscholastic athletic programs. In the 1996 Clarification, Defendants amended

the Three-Part Test to apply at least somewhat to interscholastic athletics.

153. In Defendants' 1980 enforcement manual (which HEW and Education collectively adopted contemporaneously following the release of the 1979 Policy Interpretation), the third prong of the Three-Part Test (fully accommodating the interests of the underrepresented gender) required schools to assess whether they accommodated the underrepresented gender's interest to the same extent as they accommodated the other gender's interest. In the 1996 Clarification, Defendants amended the third prong of the Three-Part Test to refer only to whether the interests of the underrepresented gender were fully accommodated, with no regard for whether the interests of the other gender also were fully accommodated.

154. The 1996 Clarification purports to authorize gender-conscious discrimination, notwithstanding the prohibitions and protections of the Overall Determination of Compliance, Title IX, the Title IX regulations, the Due Process Clause's Equal Protection component, and the Equal Protection Clause of the 14th Amendment. In that process, the 1996 Clarification amends the Title IX regulations and the Overall Determination of Compliance, without the APA-required rulemaking.

155. For the foregoing reasons, the 1996 Clarification is arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with the law and was issued without observance of procedure required by law.

VII.
THE 2003 FURTHER CLARIFICATION VIOLATED THE APA'S NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS

156. Plaintiffs incorporate paragraphs 1 through 114, paragraphs 115 through 124, paragraphs 125 through 128, paragraphs 129 through 136, paragraphs 137 through 140, paragraphs 141 through 144, and paragraphs 145 through 155 as if fully set forth herein.

157. The 2003 Further Clarification purports to elevate the Three-Part Test's second and third prongs to safe harbors and to establish that compliance with those provisions will excuse gender-conscious cuts and caps that otherwise would violate Title IX, the Title IX regulations, the Overall Determination of Compliance, the Equal Protection Component of the Due Process Clause, and the Equal Protection Clause of the 14th Amendment. In that process, the 2003 Clarification amends the regulatory prohibition against discrimination, without the APA-required rulemaking.

158. For the foregoing reasons, Defendants' 2003 Further Clarification is arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with the law and was issued without observance of procedure required by law.

VIII.
VIOLATION OF EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE

159. Plaintiffs incorporate paragraphs 1 through 114, paragraphs 115 through 124, paragraphs 125 through 128, paragraphs 129 through 136, paragraphs 137 through 140, paragraphs 141 through 144, paragraphs 145 through

155, and paragraphs 156 through 158 as if fully set forth herein.

160. By authorizing gender-conscious cutting or capping by schools not adjudged to have at schools not adjudged to have violated the intentional-discrimination standard, the Three-Part Test violates not only the Equal-Protection Component of the Due Process Clause but also Title IX and the Title IX regulations. If the Court interprets Title IX or the Title IX regulations to allow the Three-Part Test or to authorize such gender-conscious cutting or capping, then Title IX and the Title IX regulations as interpreted by the Court are unconstitutional. In the event that the Court so interprets Title IX and/or the Title IX regulations, therefore, the "other relief" requested by Paragraph 163.D includes a declaration that Title IX and/or the Title IX regulations as interpreted by the Court violate the Due Process Clause and a corresponding injunction against their enforcement in the context of athletics.

IX.

VIOLATION OF SEPARATION OF POWERS AND NON-DELEGATION DOCTRINE

161. Plaintiffs incorporate paragraphs 1 through 114, paragraphs 115 through 124, paragraphs 125 through 128, paragraphs 129 through 136, paragraphs 137 through 140, paragraphs 141 through 144, paragraphs 145 through 155, paragraphs 156 through 158, and paragraphs 159 through 160 as if fully set forth herein.

162. The constitution vests legislative authority in the Congress and requires bicameralism and presentment for the enactment of laws. U.S. CONST. art. I, §§ 1, 7. The APA requires notice-and-comment rulemaking for substantive regulations, 5 U.S.C. § 553, and such regulations may only implement the authority delegated to an agency

by Congress. Such congressional delegations must provide an intelligible principle by which the agency can implement the authority delegated by Congress. If the Court interprets Title IX to authorize Defendants (without following the APA or Title IX's own procedural restrictions) to adopt a disparate-impact affirmative-action requirement to "effectuate" a statutory prohibition against intentional gender-based discrimination, then Title IX as interpreted by the Court violates constitutional separation-of-powers and non-delegation doctrines. In the event that the Court so interprets Title IX, therefore, the "other relief" requested by Paragraph 163.D includes a declaration that Title IX as interpreted by the Court violates the constitutional separation-of-powers and non-delegation doctrines and an injunction against the enforcement of the Three-Part Test and all implementing policies.

PRAYER FOR RELIEF

163. WHEREFORE, Plaintiffs respectfully request that this Court enter the following relief:

A. Pursuant to 5 U.S.C. § 706(2), 28 U.S.C. §§ 1331, 1343(a)(4), 1361, 1651(a), 2201-2202, the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), D.C. Code § 11-501, Fed. R. Civ. Proc. 57, and the court's equitable powers, a Declaratory Judgment that:
   1. Title IX and the Equal Protection component of the Due Process Clause authorize only rules that effectuate Title IX's prohibition of intentional discrimination and do not authorize rules that create a disparate-impact standard or affirmative-action mandate;
   2. Title IX and the Equal Protection component of the Due Process Clause prohibit Defendants from

requiring or authorizing schools to engage in gender-conscious cutting or capping solely to meet a disparate-impact standard or affirmative-action mandate;

3. To the extent that schools may make gender-conscious decisions regarding athletic opportunities, Title IX, the Title IX regulations, the Equal Protection component of the Due Process Clause, and the Equal Protection Clause of the 14th Amendment require schools to use athletic interest and ability - not enrollment - as the relevant population;
4. Under Title IX, the Title IX regulations, the Equal Protection component of the Due Process Clause, and the Equal Protection Clause of the 14th Amendment, the relevant unit of "athletic opportunity" is a spot on a team, not an athlete on a team;
5. In 2003, Defendants unlawfully denied CSC's petition to repeal the Three-Part Test;
6. In 1996, Defendants unlawfully declined to address issues raised by NWCA and others regarding (a) Defendants' lack of legal authority for the Three-Part Test, and (b) the irrationality of continued adherence to the Three-Part Test in light of changed circumstances and unintended consequences;
7. Pursuant to 20 U.S.C. § 1682, the 1979 Policy Interpretation, the 1996 Clarification, and the 2003 Further Clarification have no force or effect;
8. The 1996 Clarification's elevation of the Three-Part Test to a legal obligation purported to amend the substantive Title IX regulations in violation of the

APA's rulemaking requirements, thus rendering the 1996 Clarification void *ab initio;*

9. The 2003 Further Clarification's elevation of prongs two and three to safe-harbor status purported to amend the substantive Title IX regulations in violation of the APA's rulemaking requirements, thus rendering the 2003 Further Clarification void *ab initio;*
10. In the Three-Part Test, 1996 Clarification, and 2003 Further Clarification, Defendants acted *ultra vires* both Title IX and the APA by consciously and expressly adopting a general policy that abdicates the statutory duty to issue rules, regulations, and orders to effectuate Title IX's prohibition of intentional gender discrimination without following APA-mandated procedures;
11. Defendants have a statutory obligation to terminate the federal funding of any institution that violates Title IX's prohibition against intentional, gender-based discrimination and Defendants' rules, regulations, and orders in effect pursuant to 20 U.S.C. § 1682, if such schools do not agree voluntarily to cease the discriminatory conduct; and
12. Any school that has cut or capped a team to comply with proportionality based on enrollment or to work toward achieving such proportionality constitutes a school for which opportunity for that gender have been limited, within the meaning of 45 C.F.R. § 86.41(b), 34 C.F.R. § 106.41(b), and any other similar regulatory or statutory provision.

B. Pursuant to 5 U.S.C. § 706(2), 28 U.S.C. §§ 1331, 1343(a)(4), 1361, 1651(a), 2202, the Acts of March 3,

1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), D.C. Code § 11-501, and the court's equitable powers, an Order providing that

1. The Three-Part Test is vacated as arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of the authority provided to Defendants by Congress, and promulgated without observing the procedures required by law;
2. Defendants' 1996 Clarification and 2003 Further Clarification are vacated in their entirety as arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of the authority provided to Defendants by Congress, and promulgated without observing the procedures required by law;
3. Defendants' Title IX rules on athletics are remanded to Defendants with instructions that – in accordance with a schedule set by this Court – Defendants commence notice-and-comment rulemaking to amend those rules consistent with Title IX, the U.S. Constitution, and this Court's declaratory relief in this action;
4. This Court shall retain jurisdiction over this matter until such rules are lawfully promulgated pursuant to the APA and become effective pursuant to 20 U.S.C. § 1682; and
5. Enforcement of Defendants' disparate-impact rules for athletics is stayed until Defendants promulgates a final rule pursuant to this Court's order and until such rules become effective pursuant to all procedural requirements imposed by statute.

C. Pursuant to 42 U.S.C. § 1988(b) and 28 U.S.C. § 2412, award Plaintiffs its costs, including attorneys fees.

D. Such other relief as may be just and proper.

Dated: July 30, 2004 Respectfully submitted,

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No. 06-1625

In the Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether res judicata bars petitioners' claims.

2. Whether the court of appeals correctly held that petitioners lack standing to sue the government for injuries allegedly inflicted by independent educational institutions.

3. Whether petitioners have another "adequate remedy," precluding judicial review under 5 U.S.C. 704.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-4a) is reported at 465 F.3d 20. The memorandum and opinion of the district court (Pet. App. 5a-10a) is reported at 357 F. Supp. 2d 311.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2006. Petitions for rehearing were denied on January 19, 2007 (Pet. App. 11a-12a). On April 12, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 4, 2007, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). In 1975, the Department of Health, Education, and Welfare (HEW) issued regulations under Title IX, which remain in effect through the Department of Education (Department). These regulations address the issue of sex discrimination in athletics, providing that "[a] recipient [institution] * * * shall provide equal athletic opportunity for members of both sexes." 34 C.F.R. 106.41(c). The regulations further provide that, to "determin[e] whether equal opportunities are available, the [agency] will consider, among other factors * * * [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes." *Ibid.*; 45 C.F.R. 86.41(c).

In 1979, the HEW issued a Policy Interpretation that provided a three-part test for compliance with the equal athletic opportunity requirements of the Title IX regulations. Pet. App. 19a-30a. An educational institution is in compliance under that test if it meets one of three criteria:

i. "[I]ntercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."

ii. "Where the members of one sex have been and are underrepresented among intercollegiate athletes, * * * the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex."

iii. "Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, * * * it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program."

Pet. App. 28a-29a.

In 1996, the Department further clarified the 1979 Policy Interpretation and the three-part test, emphasizing three points. First, "institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes." Pet. App. 33a. Second, the Department's test "does not provide strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case- and fact-specific. Such answers "not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law." *Id.* at 33a-34a. Third, addressing apparent "confusion about the elimination and capping of men's teams in the context of Title IX compliance," *id.* at 36a, the Department explained that "[t]he rules here are straightforward. An institution can choose to elimi-

nate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men." *Ibid.*

2. This is the second of two actions filed by essentially the same set of plaintiffs. The plaintiffs in the first suit, *National Wrestling Coaches Ass'n* v. *United States Dep't of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003), aff'd, 366 F.3d 930 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005) (*Wrestlers I*), five membership organizations representing the interests of collegiate men's wrestling coaches, athletes, and alumni, alleged that a number of colleges had discriminated against them by eliminating some of their men's sports teams for reasons related to Title IX. *National Wrestling Coaches Ass'n* v. *Dep't of Educ.*, 366 F.3d 930, 935 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005). The plaintiffs sued the Department, the Secretary of Education, and the Assistant Secretary of Education for Civil Rights, alleging that the Department's 1979 Policy Interpretation and 1996 Clarification were substantively and procedurally flawed. *Id.* at 935-936.

a. The district court granted the government's motion to dismiss the *Wrestlers I* complaint for lack of Article III standing. 263 F. Supp. 2d at 82. The court noted that the constitutional requirements of standing are difficult to satisfy where a person brings suit against the government but alleges injury inflicted by the allegedly unlawful conduct of regulated third parties. See *id.* at 110 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). The court concluded that the plaintiffs lacked standing because they had failed to establish that their injuries were fairly traceable to the challenged government action or likely to be redressed by a favor-

able decision. *Id.* at 117-123. The district court added, however, that the plaintiffs could bring suit directly against the federally-funded educational institutions alleged to have discriminated against them. See *id.* at 94-97 & n.6 (citing *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979)).

b. The court of appeals affirmed. *Wrestlers I*, 366 F.3d at 933. It held that the plaintiffs lacked Article III standing because (1) the Department's actions did not cause their alleged injuries, and (2) plaintiffs had offered "nothing to support [their] claim that a favorable ruling would alter the school's conduct" with respect to the wrestling programs. *Id.* at 944. As the court explained, "nothing in the [challenged] Three-Part test requires schools to eliminate or cap men's wrestling or any other athletic program." *Id.* at 939. Furthermore, a school may decide to cut or cap a sports team for any number of reasons having nothing to do with the Title IX policies that the plaintiffs challenged. *Id.* at 940.

In the alternative, the court of appeals held that, "even if [plaintiffs] had standing to pursue the[ir] claims," they had an "adequate remedy that bar[red]" their suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, *Wrestlers I*, 366 F.3d at 945, which subjects to judicial review "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. The court rejected the plaintiffs' contention that the Department's policy was "made reviewable by statute," *Wrestlers I*, 366 F.3d at 946-947, and it agreed with the district court that the plaintiffs could bring suit directly against the schools alleged to have engaged in illegal discrimination. *Id.* at 945-946 (citing *Cannon* v. *University of Chicago*, *supra*). This remedy, the court

held, "preclude[d] any suit against the Department under the APA." *Id.* at 946.

Judge Williams dissented, concluding that plaintiffs had standing and lacked an alternative remedy. *Wrestlers I*, 366 F.3d at 958. Judge Williams also dissented when the panel denied a petition for rehearing.

The court of appeals denied a petition for rehearing en banc, with Judge Ginsburg dissenting. *National Wrestling Coaches Ass'n* v. *Department of Educ.*, 383 F.3d 1047 (D.C. Cir. 2004). This Court denied certiorari. 545 U.S. 1104 (2005).

3. Petitioners here (*Wrestlers II*) are the same five organizations that were plaintiffs in *Wrestlers I*, plus two new groups: the Juniata Wrestling Club and the Committee to Reinstate Delaware Wrestling. As in *Wrestlers I*, petitioners have sued the Department, the Secretary of Education, and the Assistant Secretary for Civil Rights. They again allege that educational institutions have engaged in illegal discrimination against male athletes, and they seek to set aside Title IX enforcement policies, including the Department's 1979 Policy Interpretation (Pet. App. 19a-30a), 1996 Clarification (*id.* at 31a-55a), and the 2003 Clarification (*id.* at 56a-60a). *Id.* at 61a-114a (amended complaint). Petitioners also allege that Title IX is unconstitutional if interpreted to authorize the regulations as written. See *ibid.*

a. The district court issued an order directing the parties to show cause why petitioners' suit should not be dismissed and subsequently dismissed the case on the basis of *Wrestlers I*. Pet. App. 5a-6a. The court noted that "[t]he plaintiff groups in the two cases are identical, except for the addition of the Juniata Wrestling Club and the Committee to Reinstate Delaware Wrestling," *id.* at 6a, and it determined that "the Juniata and Dela-

ware [petitioners] are asserting the same causes of action, seeking the same relief, and have alleged injuries that are of the same character as the original [*Wrestlers I*] plaintiffs." *Id.* at 10a. Although it recognized that the new complaint "presents several additional allegations that the Three-Part Test and associated Department rules are unlawful," the court concluded that "[petitioners] offer nothing to distinguish the Court of Appeals' observation in [*Wrestlers I*] that 'the direct causes of [petitioners'] asserted injuries—loss of collegiate-level wrestling opportunities for male student-athletes —are the independent decisions of educational institutions.'" *Id.* at 8a (brackets in original). The court accordingly held that "the issue of redressability in this context has been conclusively settled," and it again emphasized that, "as noted repeatedly by this Court and the Court of Appeals, the proper remedy for [petitioners'] alleged injuries is an 'action directly against universities that discriminate in violation of Title IX.'" *Id.* at 8a-9a.

b. The court of appeals affirmed in part and reversed and remanded in part in a per curiam decision. Pet. App. 1a-4a. Explaining that "[t]here are no material differences between the complaint in [*Wrestlers I*] and the complaint in this case with respect to [petitioners'] statutory and constitutional claims," the court concluded that "the jurisdictional holding in [*Wrestlers I*] is res judicata here as to the five parties who appeared in [*Wrestlers I*]." *Id.* at 2a. The court held that "all parties," including the new petitioners, were "bound by the stare decisis effect of th[e] court's decisions," and the court's decision in *Wrestlers I* "conclusively settled" the "statutory and constitutional issues raised in this case." *Id.* at 2a-3a.

The court found only "one notable difference" between the claims presented in *Wrestlers I* and *Wrestlers II*. Pet. App. 3a. In *Wrestlers II*, petitioner College Sports Council (CSC) sought to challenge the Department's denial of a rulemaking petition it had filed seeking repeal of the three-part test. The court held that CSC had standing to pursue that challenge and that *Wrestlers I* "is not res judicata as to this issue" because CSC's petition to initiate rulemaking had not been not denied until after the judgment in *Wrestlers I* had been issued. *Ibid.* The court remanded the case to the district court on that limited issue. *Id.* at 3a-4a.[1]

ARGUMENT

The per curiam decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The Court denied certiorari as to the earlier iteration of this case. *National Wrestling Coaches Ass'n* v. *Department of Educ.*, 383 F.3d 1047 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005). Further review of this follow-on action is similarly unwarranted.

1. This Court "has long recognized that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.'" *Underwriters Nat'l Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) (brackets in original) (quoting *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166 (1932)). Thus, a "question of subject-matter jurisdiction" that has been "fully litigated in the original forum" cannot be "retried in a subsequent action be-

[1] CSC filed for voluntary dismissal of its claims on April 2, 2007, and is not a petitioner here. See Notice of Voluntary Dismissal, *College Sports Council* v. *Department of Education*, No. 03-2588-EGS (D.D.C).

tween the parties." *Durfee* v. *Duke*, 375 U.S. 106, 112 (1963); see *Dynaquest Corp.* v. *USPS*, 242 F.3d 1070, 1076 n.5 (D.C. Cir. 2001) ("[T]he doctrine of *res judicata* applies to dismissal for lack of jurisdiction as well as for other grounds.") (quoting *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983)), cert. denied, 534 U.S. 953 (2001)).

Under these principles, the five petitioners who were plaintiffs in *Wrestlers I* cannot relitigate the Article III standing question that was "conclusively settled" (Pet. App. 2a-3a) in that case. The court in *Wrestlers I* held that the relief sought by petitioners against the government could not redress their claimed injuries, and for that reason subject matter jurisdiction was lacking. 366 F.3d at 930. That jurisdictional holding is preclusive here and compels dismissal of petitioners' claims.[2] See Pet. App. 2a ("[w]e affirm the District Court's judgment that appellants lack standing for want of redressability").

That conclusion is not undermined by petitioners' claimed "curable-defect" exception to res judicata. See Pet. 13-17. The court of appeals held in *Wrestlers I* that petitioners lacked Article III standing because they had sued the government for injury alleged to have been caused by the unlawful discrimination of independent

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[2] Although petitioners suggest that the *Wrestlers I* proceedings were based on a "misread[ing]" of a General Accounting Office (GAO) report (Pet. 18 & n.10), the court of appeals made clear in *Wrestlers I* that the cited report was not necessary to its analysis. See 366 F.3d at 942-943. Nor does this Court's intervening decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), cited by petitioners (Pet. 18 & n.11), alter the analysis. *Jackson* held that the private right of action implied by Title IX encompasses retaliation claims. That ruling provides no assistance to petitioners on the dispositive issues of preclusion and subject matter jurisdiction.

educational institutions. On that basis, the court of appeals determined that the relief sought would not redress the injuries claimed. *Wrestlers I*, 366 F.3d at 930. That fatal deficiency in petitioners' standing is equally present in this case, and is not a "defect" that can be "cured." See Pet. App. 2a ("There are no material differences between the complaint in [*Wrestlers I*] and the complaint in this case with respect to appellants' statutory and constitutional claims.").[3]

2. Although res judicata does not apply to the two petitioners that were not parties in *Wrestlers I*, the court of appeals correctly held that the jurisdictional and statutory issues they raised were foreclosed as a matter of precedent. Pet. App. 2a-3a. Petitioners seek to relitigate the validity of *Wrestlers I*'s standing analysis, but that analysis is correct and is not in conflict with any decision of this Court or the other courts of appeals. Indeed, this Court denied the petition for a writ of certiorari in *Wrestlers I*, 545 U.S. 1104 (2005) (No. 04-922), and there is no reason for a different result here.

a. To establish standing under Article III, a plaintiff must allege an injury in fact that is fairly traceable to the challenged government action and is likely to be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Mere "spec-

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[3] Petitioners contend that the principles of res judicata do not apply because their complaint is a new cause of action that challenges the clarification of the three-part test issued by the Department in 2003 (Pet. App. 56a-60a), which is part of the same Title IX enforcement policy as the 1979 Policy Interpretation (*id.* at 19a-30a) and 1996 Clarification (*id.* at 31a-55a) originally challenged. See Pet. 16-17. As explained below, the court of appeals correctly held that those claims that were not barred by res judicata are foreclosed as a matter of precedent. See Pet. App. 2a-3a.

ula[tion]" that the alleged injury will be redressed by a favorable decision is insufficient to meet the constitutional requirements. *Id.* at 561. Petitioners claim as the source of their injury the decisions made by various colleges and universities to eliminate or to reduce the size of their men's sports teams. But petitioners have not sued any of the allegedly offending educational institutions. Instead, they have sued the Department, claiming that the Department's Title IX enforcement policies are responsible for their alleged injury.

Because petitioners' alleged injury arises from the government's regulation of a third party not before the Court, the redressability component of standing is "'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)).[4] Where standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ibid.* (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989)), "it becomes the burden of the

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[4] Petitioners also assert that they have standing to seek redress of various "direct injuries" that "[*Wrestlers I*] did not address." Pet. 20 (emphasis omitted) (citing *International Primate Prot. League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991)). Those claims are meritless. Unlike the plaintiffs in *International Primate*, who actually "lost the right" to file in their forum of choice, petitioners have not in any way been precluded from utilizing the administrative forum they prefer. See Pet. 21. Additionally, although petitioners argue that the Department has directly impaired their "freedom to interact" with affected schools (Pet. 19), petitioners have not, as described below, pp. 13-15, *infra*, offered any reason to believe that Title IX or the Department's regulations, rather than the unrelated choices of the independent educational institutions involved, caused their injury.

plaintiff to adduce facts showing that those choices have been or will be made in such manner as to * * * permit redressability of injury." *Ibid.*; see *Wright*, 468 U.S. at 739-740, 758 (holding that parents of black public school children lacked standing to challenge the IRS's failure to withdraw tax exempt status from racially discriminatory schools because it was entirely speculative whether withdrawal of a tax exemption would lead the school to change its policies).

Petitioners fail sufficiently to allege standing as required by these cases. Like the plaintiffs in *Wrestlers I*, see 366 F.3d at 936-945, petitioners here have failed to show a "substantial probability" that a decision invalidating the 1979 Policy Interpretation, the 1996 Clarification, or even Title IX itself would likely lead universities and colleges to alter their independent decisions to eliminate or reduce the size of men's athletic programs. *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975). As the court of appeals recognized in *Wrestlers I*, 366 F.3d at 940, a college or university may choose to eliminate or reduce the roster size of an athletic squad for any number of reasons unrelated to legal requirements or the sex of the athletes involved—such as budgetary constraints, spectator interest, or the lack of suitable competition. See Pet. App. 75a (recognizing that a school might refuse to fund women's, as well as men's, teams); *cf. Telephone & Data Sys., Inc.* v. *FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994) (refusing "'to presume illegal activities' on the part of actors not before the court") (quoting *United Transp. Union* v. *ICC*, 891 F.2d 908, 914 (D.C. Cir. 1989), cert. denied, 497 U.S. 1024 (1990)). Under these circumstances, the court of appeals correctly concluded that petitioners failed to satisfy the redressability element of

Article III standing. That case-specific and fact-bound question does not warrant this Court's review.

3. Review is also unwarranted because, even apart from application of res judicata and petitioners' lack of standing, petitioners' action is foreclosed under 5 U.S.C. 704. The APA provides for judicial review of agency action that is "made reviewable by statute" and final agency action "for which there is no other adequate remedy in a court." *Ibid.* As the court of appeals concluded in *Wrestlers I*, neither basis for suit is available here. See 366 F.3d at 945-948.

This is not a case in which "there is no other adequate remedy in a court." 5 U.S.C. 704. Under *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), petitioners have a private right of action against schools that discriminate in violation of Title IX. Because petitioners challenge the 1979 Policy Interpretation and the 1996 Clarification on the ground that they violate the Equal Protection Clause and Title IX itself, that right of action is an "adequate remedy" for the discrimination alleged. See *Washington Legal Found.* v. *Alexander*, 984 F.2d 483 (D.C. Cir. 1993); accord *Jersey Heights Neighborhood Ass'n* v. *Glendening*, 174 F.3d 180, 191-192 (4th Cir. 1999); *New York City Employees' Ret. Sys.* v. *SEC*, 45 F.3d 7, 14 (2d Cir. 1995).[5]

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[5] Petitioners contend (Pet. 30 & n.19) that this Court should grant certiorari to resolve a circuit split over the question of "preemption" under 42 U.S.C. 1983. That alleged split, however, is not at issue in this case. Petitioners are not, as they suggest (Pet. 30), prohibited from raising constitutional challenges to Title IX in suits against school districts in the Third Circuit. see *Williams* v. *School Dist.*, 998 F.2d 168, 175-176 (3d Cir. 1993) (considering Title IX and federal constitutional claims against school district), cert. denied, 510 U.S. 1043 (1994), and neither the district court nor the court of appeals in *Wrestlers I* or *Wrestlers II* addressed the alleged conflict.

Nor is this a case in which agency action is "made reviewable by statute." 5 U.S.C. 704. In arguing otherwise, petitioners rely (Pet. 24) on 20 U.S.C. 1683, which provides that agency action under Title IX "shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." As the court of appeals explained in *Wrestlers I*, however, "the reference to agency actions 'made reviewable by statute' in § 704 relates to statutory provisions other than the APA that govern judicial review of those actions." 366 F.3d at 946-947. Section 1683 is not such a statute. Cf. *Cousins* v. *Secretary of the U.S. Dep't of Transp.*, 880 F.2d 603, 604-608 (1st Cir. 1989) (en banc) (opinion of Breyer, J.) (holding that provision of Title VI, incorporated in 29 U.S.C. 794a(a)(2), which provides for "such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds," 42 U.S.C. 2000d-2, limits individual to APA review).

Petitioners also err in arguing (Pet. 26) that they can circumvent the APA's judicial review provisions by adding as defendants the Secretary and Assistant Secretary of Education in their official capacities. See Pet. iii n.*. In the context of a suit challenging agency action, a suit against a government officer in his or her official capacity is simply "another way of pleading an action against an entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985); see Pet. App. 69a (stating that the Secretary of Education and the Acting Assistant Secretary for Civil Rights, defendants Paige and Marcus, "are not sued in their individual capacities for monetary or punitive damages"). Accordingly, petitioner's suit against the Secretary and Assistant Secre-

tary is simply another way of suing the Department and is subject to the limitations for review of agency action set forth in 5 U.S.C. 704.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007

(2)

No. 06-1625

IN THE
Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION, COMMITTEE TO REINSTATE DELAWARE WRESTLING, JUNIATA WRESTLING CLUB, COMMITTEE TO SAVE BUCKNELL WRESTLING, MARQUETTE WRESTLING CLUB, *AND* YALE WRESTLING ASSOCIATION,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION, MARGARET SPELLINGS, *IN HER OFFICIAL CAPACITY AS SECRETARY OF EDUCATION AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW*, STEPHANIE MONROE, *IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY FOR CIVIL RIGHTS AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW, AND* UNITED STATES OF AMERICA,

RESPONDENTS

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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PETITIONERS SUPPLEMENTAL BRIEF

Pursuant to this Court's Rule 15.8, petitioners file this Supplemental Brief on the application here of *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 2007 WL 1836531 (June 28, 2007), which came down after the filing of the petition for a writ of *certiorari* dated June 4, 2007.

On June 28, 2007, this Court rejected the mechanical application of group "balancing" to the exclusion of individual equal-protection rights. *Parents Involved*, 2007 WL 1836531, *17 (rejecting quotas and balancing as ends in themselves) (plurality); *49 (Kennedy, J., concurring in part and concurring in judgment) (rejecting "plan... [that] relies upon a mechanical formula... on the basis of three rigid criteria"). Four dissenting justices considered *Parents Involved* to make new law. *Id.* at *52 (Stevens, J. dissenting); *id.* at *54 (Breyer, J., dissenting). If the *Parents Involved* schools' minor balancing of race (along with two non-suspect factors[1]) qualifies as unconstitutionally mechanical in its focus, *id.* at *19-*20, Petitioners respectfully submit that the Federal Respondents' systemic and exclusive reliance on a gender quota does not present even a close question under the Equal Protection Clause.

In what they call "copy-cat" litigation, the same Federal Respondents here filed a motion to dismiss that also serves as their opposition to the plaintiff's motion for interim relief against James Madison University's decision to cut ten

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[1] In addition to race, the Seattle plan considered siblings' placement and distance from schools. *Parents Involved*, at *49. As such, the Seattle Plan was a three-factor test, whereas the "Three-Part Test" at issue here offers three ways to rely on a single factor (gender).

athletic teams to comply with the Three-Part Test. *Equity in Athletics, Inc. v. Dep't of Educ.*, No. 5:07-0028-GEC (W.D. Va.), Fed. Defs.' Mot. to Dismiss, at 2-3 (July 12, 2007) ("Fed. Defs.' Opp'n"). In that brief, the Federal Respondents cavalierly argue that this Court's race-discrimination jurisprudence is *irrelevant* to gender discrimination:

> Cases involving the constitutionality of racial classifications, such as the recent Supreme Court decision in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, -- U.S. --, 2007 WL 1836531 (June 28, 2007), are not relevant to the instant case, which involves a gender-based classification. Racial classifications are reviewed under strict scrutiny, whereas gender classifications are reviewed under the less demanding intermediate scrutiny. *See Seattle School Dist.*, 2007 WL 1836531 at *11; *Cohen II*, 101 F.3d at 183-84; *Kelley*, 35 F.3d at 272.

Fed. Defs. Opp'n, at 36 n.9. As explained below, the Federal Respondents' citation to *Cohen* and *Kelley* rejects the application not only of *Parents Involved*, but also of *Adarand Constructors*, to gender-based discrimination.

ARGUMENT

Based on *Parents Involved* and its supposed irrelevance to gender discrimination, Petitioners make two arguments. First, the Three-Part Test's constitutionality is uncertain, notwithstanding (or, perhaps, because of) the deference that courts of appeal have granted the Federal Petitioners' procedurally invalid amendment by "interpretation" of the 1975 Title IX regulations. Second, the lower courts would benefit from this Court's clear rejection (or acceptance) of the proposition that the Court's race-based equal-protection

jurisprudence is irrelevant to gender discrimination.

I. TITLE IX CASES DO NOT RESOLVE CONSTITUTIONAL ISSUE

The Equal Protection Clause of the Fourteenth Amendment prohibits intentional gender-based discrimination (*i.e.*, actions taken *because of gender*, not those in spite of gender). *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). The Fifth Amendment's Due Process Clause includes an equal-protection component applicable to the federal government, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), which offers the same equal-protection guarantees as the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Under the intermediate scrutiny applicable to gender-based Equal Protection claims, governments can justify gender discrimination only to achieve "important governmental objectives," with the "discriminatory means... substantially related to [achieving such] objectives." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (interior quotations omitted). "The burden of justification is demanding and it rests entirely on the [government]." *Id.*

Although eight appellate courts have found the Three-Part Test lawful *under Title IX*, they devoted surprisingly little thought on the Three-Part Test's *constitutionality*. What little thought they have devoted relies on superseded Court decisions or case-specific facts. Often, when women sought to enforce their regulatory "rights" under the Three-Part Test,

the Equal Protection Clause simply did not come up.[2] Even more often, appellate courts have expressly declined to address the Equal Protection Clause's application to the Three-Part Test.[3] Because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents," *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)), the decisions cited in notes 2 and 3 cannot support the Three-Part Test's constitutionality. The next four sections explain why the remaining Three-Part Test decisions cannot support it either.

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[2] *See, e.g., Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (silent on constitutional issues); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 884 (5th Cir. 2000) (reaching only Title IX).

[3] *See, e.g., Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 614 (6th Cir. 2002) ("Nothing in any version of the complaint can be construed as a direct [constitutional] challenge to either the law, the regulations or the Policy Interpretation"); *Chalenor v. Univ. of North Dakota*, 291 F.3d 1042, 1049 (8th Cir. 2002) ("plaintiffs admit that they admit that they 'did not assert a constitutional violation' in the District Court..., so we need not decide the constitutional issue"); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 640 (7th Cir. 1999) ("availability of [Title IX] claim preempts the remedies available for sex discrimination under Section 1983"); *Kelley v. Bd. of Trustees, Univ. of Ill.*, 35 F.3d 265, 272 (7th Cir. 1994) ("plaintiffs' [constitutional challenge to school's cuts] is merely a collateral attack on the statute and regulations and is therefore impermissible"); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 176 (3rd Cir. 1993) (avoiding constitutional issue because "Congress intended to foreclose a right of action under section 1983").

A. *Horner* Litigation. Because it involved an effort to establish a new interscholastic sport for girls, the Sixth Circuit's *Horner* litigation did not directly present the discrimination issues that Petitioners raise here. *See Horner v. Kentucky High School Athletic Ass'n.*, 43 F.3d 265 (6th Cir. 1995) ("*Horner I*"). Moreover, by denying relief under the Equal Protection Clause in *Horner I,* but allowing it under the Three-Part Test, the *Horner* litigation demonstrates that the Equal Protection Clause protects against only actions taken because of gender, *Horner I,* 43 F.3d at 276, whereas the Three-Part Test overlays an affirmative "equal opportunity mandate," *Horner v. Kentucky High School Athletic Ass'n,* 206 F.3d 685, 694 (6th Cir. 2000). In drawing that distinction between the regulatory mandate for equal opportunity and the constitutional protection from intentional discrimination, the *Horner* litigation demonstrates that the Three-Part Test covers more than intentional discrimination, which is precisely Petitioners' point.

B. *Kelley* Litigation. Although the court considered "plaintiffs' [constitutional challenge to school's cuts] merely a collateral attack on the statute and regulations and... therefore impermissible," *Kelley v. Bd. of Trustees, Univ. of Ill.,* 35 F.3d 265, 272 (7th Cir. 1994), *Kelley* also briefly considered whether "Title IX and the applicable regulation – rather than the actions of the defendants – are unconstitutional." *Id.* Relying on *Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 565-66 (1990), to review "benign" classifications under lesser scrutiny, *Kelley* rejected that facial challenge out of hand. *Id.* Subsequent to *Kelley,* this Court overruled *Metro Broadcasting*'s treatment of benign classifications for race. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995) (overruling *Metro Broadcasting* to require same scrutiny for all classifications).

C. ***Cohen* Litigation**. Because Brown University is a private school not subject to the Fourteenth Amendment, its constitutional argument surfaced when the University raised a Fifth Amendment challenge to the Three-Part Test on behalf of its non-party male students. *See Cohen v. Brown Univ.*, 101 F.3d 155, 170, 181 & n.17 (1st Cir. 1996). The women plaintiffs challenged Brown's third-party standing to raise nonparties' equal-protection rights, which the court declined to consider, preferring to reach the merits. *Id.* In doing so, the *Cohen* court exceeded its jurisdiction, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998), rendering its equal-protection analysis *dicta*.

In any event, *Cohen* analyzed the constitutional issue incorrectly. *First, Cohen* based its constitutional analysis on the Fifth Amendment's broad powers to remedy past discrimination, *Cohen v. Brown Univ.*, 991 F.2d 888, 901 (1st Cir. 1993), without recognizing that Congress adopted Title IX exclusively under the Spending Clause, not the Fifth Amendment. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999). *Second,* just as Title IX lacked a congressional finding of past discrimination under the Fifth or Fourteenth Amendments, *Cohen* did not recognize that the agency expressly did not find universal discrimination. 44 Fed. Reg. at 71,420. *Third, Cohen* initially relied on the *Metro Broadcasting* decision that this Court overruled in *Adarand. Compare Cohen,* 991 F.2d at 901 *with* Section I.B, *supra. Fourth and finally, Cohen* disregarded *Adarand* both under the law of the case doctrine and because Brown had already been found guilty of discrimination. *See Cohen,* 101 F.3d at 183 (distinguishing between lawfulness of affirmative-action programs generally and of a court-ordered remedy after an adjudicated finding of discrimination).

For all of the foregoing reasons, *Cohen* cannot control

here on the constitutional issues. Petitioners have associational standing to raise their members' equal-protection rights; the schools have no adjudicated history of discrimination against female athletes, First Am. Compl. ¶22 (App. 73a); and, particularly as to the new plaintiffs, no law of the case or Court precedent constrains this Court's reaching a correct decision here.

D. *Neal* Litigation. Similarly, in *Neal v. Bd. of Trustees of the Cal. State Univ.*, 198 F.3d 763 (9th Cir. 1999), the school operated under a consent decree for past discrimination against women. *Neal,* 198 F.3d at 765. Indeed, *Neal* technically did not reach the constitutional merits, *Neal,* 198 F.3d at 772 (court would apply intermediate scrutiny "were we addressing the constitutional merits"). Instead, the *Neal* court merely "h[e]ld that the constitutional analysis contained [in *Kelley* and *Cohen*] persuasively disposes of any serious constitutional concerns" with the Three-Part Test as applied under the facts of that case. *Neal,* 198 F.3d at 772-73. Significantly, then, the *Neal* decision relies on *Kelley* and *Cohen* (distinguished in Sections I.B, I.C, *supra*) and involved a school with a past finding of intentional discrimination against women, which expressly does not apply here. First Am. Compl. ¶22 (App. 73a).

II. CONSTITUTIONAL ISSUES NEED RESOLUTION

Because the "power to interpret the Constitution in a case or controversy remains in the Judiciary," *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997), the Supremacy Clause compels reaching the important constitutional issues here:

> The fact that [a Title IX exemption] applies to [a school] provides the [government] no solace: "[A] statute apparently governing a dispute cannot be

> applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution.

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731-33 (1982) (first, second, and third alterations added).

As explained in Section I, the decisions that uphold the Three-Part Test have not resolved its constitutionality. *Kelley* simply disregarded an as-applied constitutional challenge to gender-conscious cuts as "impermissible," and *Cohen* lacked subject-matter jurisdiction over constitutional issues altogether. Both *Kelley* and *Cohen* relied on *Metro Broadcasting* for the discredited view that the Constitution views "good discrimination" more favorably than "bad discrimination." *Neal* simply relied on *Kelley* and *Cohen,* which (as just demonstrated) are deeply flawed.

Particularly in circuits that view Title IX to "preempt" §1983 actions on the Equal Protection Clause, Pet. at 30 & n.19, the weight of Three-Part Test authority impedes plaintiffs' ability to redeem their constitutional rights, notwithstanding the lack of credible constitutional authority to support the Three-Part Test. What district court or court of appeals wants to buck eight (or nine) courts of appeal? The constitutional issue here presents an important counterpoint to a circuit split: three-circuit unanimity that falsely resembles eight-circuit unanimity, but is plainly wrong.

But even if the First, Seventh, and Ninth Circuits (and the Federal Respondents) are right – *i.e.*, even if *Parents Involved* and *Adarand Constructors* do not apply in gender cases – this Court should say so. That resolution would clarify the law and resolve splits of authority on the application of intermediate scrutiny in gender discrimination.

The lower courts (and the parties here) are split on whether and how the general principles of this Court's race-discrimination jurisprudence apply to gender discrimination. For example, "[u]nder the [post-*Croson*] precedent in [the Sixth] Circuit, gender based affirmative action plans are subject to strict scrutiny when challenged under the Equal Protection Clause." *Brunet v. City of Columbus*, 1 F.3d 390, 404 (6th Cir. 1993). Similarly, the Ninth Circuit has applied strict scrutiny to Title IX because Title IX mirrors Title VI, which *Bakke* held to require strict scrutiny. *Jeldness v. Pearce*, 30 F.3d 1220, 1227-28 (9th Cir. 1994); *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1367 (S.D. Ga. 2000) (same). By contrast, other circuits have applied intermediate scrutiny to gender-conscious remedial plans. *See, e.g., Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994) ("Intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases"); *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1010 (3rd Cir. 1993) ("applying *Croson*'s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny"); *see also Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 62 (2nd Cir. 1992) (recognizing circuit split and that "appropriate standard of review concerning gender-based set-asides remains unclear").

The lower courts also have split on the evidence required to support remedial discrimination and, specifically, whether such remediation requires past discrimination. *Compare Ensley Branch*, 31 F.3d at 1580 ("Under the intermediate scrutiny test, a local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself") *with Conlin v.*

Blanchard, 890 F.2d 811, 816 (6th Cir. 1989) ("for a... sex based remedial measure to withstand scrutiny under the fourteenth amendment there must first be some showing of prior discrimination by the governmental entity involved").

Even more puzzling than scrutiny itself are the contours of the interests to which to it applies: the "distinction between an 'important interest' under intermediate scrutiny and a 'compelling interest' under strict scrutiny" remains "unclear," *Grutter v. Bollinger*, 288 F.3d 732, 742 n.7 (6th Cir. 2002) (*en banc*), *aff'd* 539 U.S. 306 (2003). In the race cases, numerical balance is not an end in itself. *Parents Involved*, 2007 WL 1836531, *17 (plurality); *49 (Kennedy, J., concurring in part and concurring in judgment). The most obvious interest here (avoiding intentional discrimination) has no "substantial" relationship to a population-based quota that disregards athletic interest. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 651 (1989) ("nonsensical" to measure alleged discrimination by comparing participation in specialized pursuits with general population). At least to Petitioners, it remains far from clear that gender balance justifies eliminating whole teams or individual athletes – even if self-funded – just to make the numbers look good.

CONCLUSION

In light of *Parents Involved* (and the cavalier federal response to it), the writ of *certiorari* should be granted.

August 10, 2007 Respectfully submitted,

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No. 06-1625

IN THE

Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION, COMMITTEE TO REINSTATE DELAWARE WRESTLING, JUNIATA WRESTLING CLUB, COMMITTEE TO SAVE BUCKNELL WRESTLING, MARQUETTE WRESTLING CLUB, *AND* YALE WRESTLING ASSOCIATION,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION, MARGARET SPELLINGS, *IN HER OFFICIAL CAPACITY AS SECRETARY OF EDUCATION AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW,* STEPHANIE MONROE, *IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY FOR CIVIL RIGHTS AND HER INDIVIDUAL CAPACITY UNDER COLOR OF LAW, AND* UNITED STATES OF AMERICA,

RESPONDENTS

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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PETITIONERS' REPLY BRIEF

Petitioners file this reply in support of their petition.

ARGUMENT

In their brief in opposition ("Fed. Opp'n"), the federal respondents (collectively, hereinafter "Government") claim the panel decision does not conflict with decisions of this Court or any other appellate court, Fed. Opp'n, at 8, then briefly argue that this Court should let the panel decision stand under principles of *res judicata* based on the prior National Wrestling Coaches Association ("NWCA") litigation (*id.* at 8-10), lack of standing (*id.* at 10-13), and 5 U.S.C. §704's limit on the waiver of sovereign immunity in the Administrative Procedure Act ("APA") (*id.* at 13-15). Petitioners reiterate several of the more significant conflicts with the decisions of this Court and other courts of appeal that the Government ignores (Section I) and rebut the few affirmative arguments that the Government makes (Section II).

I. PANEL DECISION CONTRADICTS DECISIONS OF THIS COURT AND OTHER CIRCUITS

To claim that the panel decision "does not conflict with any decision of the this Court or any other court of appeals" Fed. Opp'n, at 8, the Government ignores several such conflicts raised in the petition and reiterated here.

A. Three-Judge Panels Must Follow Precedent. Under controlling D.C. Circuit precedent, the non-*NWCA* plaintiffs affiliated with public schools have both standing and judicial review. *Comm. for Full Employment v. Blumenthal,* 606 F.2d 1062, 1066 & n.18 (D.C. Cir. 1979) (Fourteenth Amendment's independent prohibition against government discrimination precludes state entities' refusing federal funds to continue discrimination); *Adams v. Bell,* 711 F.2d 161, 167-68 & nn.35, 36 (D.C. Cir. 1983) (*en banc*) ("judicial review will be available only after a Federal 'department or agency action,' [which] include[s] the 'conscious[] and express[] adopt[ion] of a general policy' of nonenforce-

ment") (citations omitted); *accord* 711 F.2d at 182 & n.58 (Wright, J., dissenting); *see also* Section I.G, *infra* (judicial review against federal officers' *ultra vires* actions). Significantly for standing and judicial review, the *NWCA* pleadings addressed only discrimination by *private* schools and sought relief against only sovereign federal entities.

In refusing to follow controlling precedents on standing and judicial review, which *NWCA* did not and could not overrule, the panel below violated the law of every circuit by purporting to overrule settled law without the authority to do so. Pet. at 10-11. Following *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999), and *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998), this Court should reject the panel's "extreme" application of preclusion to nonparties and its ignoring of binding authority.

B. Scope of "Curable-Defect" Exception. The Government ignores the circuit split on the "curable-defect" exception to preclusion, Pet. at 14-15, acknowledging Petitioners' curable-defect argument only in passing, to parrot that the pleadings are fatally and incurably deficient under *NWCA*. Fed. Opp'n, at 9-10. In doing so, the Government ignores the fact that the panel below found both standing and judicial review to challenge the Three-Part Test, albeit only for post-*NWCA* claims that *NWCA* could not have addressed. App. 3a. Insofar as the pleadings establish both standing and judicial review, the *NWCA* defects obviously are both curable and cured.

C. *Res Judicata* for New Causes of Action. Apparently acknowledging that *res judicata* does not apply to new causes of action, Fed. Opp'n, at 10 n.3, the Government ignores the dual circuit splits on both the applicability of that doctrine to continuing violations and its timing (*e.g.*, to

actions that arise after filing the prior complaint versus those that arise after entry of the prior judgment). Pet. at 16-17. If the petition-denial plaintiff that has thrown in the proverbial towel had standing and judicial review over the 2003 denial of its petition to repeal the Three-Part Test, the remaining plaintiffs have standing and judicial review over the 2003 decision to maintain the Three-Part Test. Pet. at 16 (*citing I.C.C. v. Bhd. of Locomotive Eng'rs,* 482 U.S. 270, 278 (1987)). As a new cause of action, *res judicata* does not apply, both as a matter of law, Pet. at 17, and because *NWCA* did not purport to preclude "review of [the *NWCA* plaintiffs'] claims on the merits, when raised in a judicially reviewable case or controversy." *NWCA,* 366 F.3d at 947.

D. Indirect "Unequal Footing" Injuries. In *Clinton v. New York,* nine justices of this Court agreed that the "unequal footing" form of injury applies to "third-party" or indirect equal-protection injuries. 524 U.S. 417, 433 & n.22 (1998); 524 U.S. at 456-57 (Scalia, J., dissenting). The *NWCA* panel relied on the indirect nature of injury to deny standing based on restoring an equal competitive footing, as distinct from standing based on restoring cut teams. *NWCA,* 366 F.3d at 944 ("These 'unequal footing' cases are inapposite here. In both *Gratz* and *Adarand,* the challenged policies *directly* injured the plaintiffs, without any intervening, third-party decision maker.") (emphasis in original). Absent *Clinton* (which the *NWCA* parties did not brief), the D.C. Circuit's decision would present a clear split with *Bras v. Cal. Pub. Util. Comm'n,* 59 F.3d 869, 873 (9th Cir. 1995), on an issue central to federal jurisdiction over government dictates to lower levels of government, employers, and schools. Given *Clinton,* however, the panel's refusal to find unequal-footing standing, at least for the non-*NWCA* parties, presents

a clear instance of a lower court's forgetting its place.

E. Authorization of Illegal Conduct. The Government ignores Petitioners' argument for standing based on the authorization of otherwise-illegal conduct. Pet. at 14, 20-21. Significantly, although it considered Title IX to provide an adequate enforcement remedy for *violations* of Title IX and its regulations at the "heart of appellants' claim," *NWCA*, 383 F.3d at 1048, *NWCA* denied standing on this theory because Title IX or its regulations *may* allow *some* gender-conscious cutting and capping, and the *NWCA* pleadings challenged only the Three-Part Test. 366 F.3d at 940-41. The pleadings here cure that oversight by challenging both, to the extent that they authorize gender-conscious cutting and capping "remedies" by schools not first adjudged to have violated Title IX. Pet. at 14, 20-21; Petitioners' Suppl. Br., at 9-10 (noting circuit splits on whether remedial gender discrimination requires history of discrimination by the entity). Even under *NWCA*, the pleadings establish standing.

F. Systemic Review. The Government ignores important decisions of this Court that §704 does not bar judicial review of federal standards, even when statutes confine individual review to other forums. Pet. at 29 (*citing Int'l Union v. Brock*, 477 U.S. 274, 285 (1986) *and Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990)). Reviewing Title IX's regulatory standards is particularly critical because (unlike in *NWCA*), Petitioners wish to challenge schools' athletic decisions via administrative complaints, which now are futile because the Government does not follow its regulations. App. 75a (¶28); Pet. at 23. Significantly, this injury is a first-party injury, which obviates *NWCA*'s heightened showing of causation and redressability. Pet. at 19.

G. Officer Suits. By characterizing this and *NWCA* as

both involving suits against the "Secretary" and "Assistant Secretary," Fed. Opp'n, at 4, 6, the Government fails to recognize that Petitioners here successfully invoked the venerable officer-suit exception to sovereign immunity by naming and serving the individual officers in their official and individual capacities. Pet. at 26-27. By contrast, *NWCA* addressed a proffered but not filed second amended complaint that named only federal offices, which *NWCA* in *dicta* would have rejected solely on sovereign immunity. *NWCA,* 366 F.3d at 947. Of course, naming "the officer..., both in [her] official capacity and acting under color of legal authority,... [invokes] those cases where the action is nominally brought against the officer in [her] individual capacity even though [she] was acting within the apparent scope of [her] authority and not as a private citizen. *Such actions are also in essence against the United States but are brought against the officer... as an individual only to circumvent what remains of the doctrine of sovereign immunity.*" *Stafford v. Briggs,* 444 U.S. 527, 539 (1980) (*quoting* H.R. Rep. No. 1936, 86th Cong., 2d Sess., 3-4 (1960)) (Court's emphasis); *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1328-29 (D.C. Cir. 1996) ("Nothing in the subsequent enactment of the APA.... repeal[s] the review of *ultra vires* actions;" "there is no sovereign immunity to waive – it never attached").

> [T]hat the King's courts in the name of the King could order his officers to account for their conduct [] was the essence of the doctrine of "the rule of law." Whatever the logical contradictions between this doctrine and sovereign immunity, the doctrine had become firmly established [and] as much a part of the law as the doctrine of sovereign immunity.

Louis L. Jaffee, *The Right to Judicial Review I,* 71 HARV. L. REV. 401, 432 (1958). Because *NWCA* did not present a

properly invoked officer suit, the Government officers cannot rely on it to evade review. Moreover, if the Government correctly argues that APA review is unavailable, naming and serving the officers qualifies as a post-*NWCA* event that cures the pleading defect, even under the panel's view of the law. *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983); *cf. Costello v. U.S.*, 365 U.S. 265, 285-86 (1961).

II. RESPONDENTS' REASONS FOR DENYING REVIEW ARE UNTENABLE

To the extent that Section I does not already do so, Petitioners refute the Government's affirmative arguments against this Court's granting the writ of *certiorari*.

A. Preclusive Effect of *NWCA*. The Government attempts to rebut Petitioners' arguments against *NWCA*'s preclusive effect. Fed. Opp'n, at 9 n.2. First, the Government misunderstands the *NWCA*-cited government report, which misleadingly suggests that aggregate men's teams increased under the Three-Part Test and inconclusively cites "gender-equity concerns" as a primary reason for schools to cut men's teams. *NWCA*, 366 F.3d at 943 ("report does not define [whether] 'gender equity concerns' ... are self-imposed or legally required"); Pet. at 18 & n.10. The report clearly misled the *NWCA* panel to believe aggregate men's teams had increased, *NWCA*, 366 F.3d at 942, when they clearly decreased. Pet. at 18 & n.10. As relevant here, that undermines *NWCA*'s analysis of standing, which concerns the interrelationship between injury, causation, and redressability. The *NWCA*-cited "inconclusiveness" concerned schools' *reasons for cutting* men's teams, not the *fact of cutting* men's teams, which *NWCA* (inaccurately) deemed "precise." *NWCA*, 366 F.3d at 942. Second, the Government suggests that *Jackson v. Birmingham Bd. of Educ.* merely held Title

IX to prohibit retaliation, without considering that the school retaliated against Coach Jackson because of *his students' gender*. Pet. at 18 & n.11. By expanding Title IX to include disparate treatment of coaches because of their students' gender, *Jackson* clearly expands coaches' rights and warrants reconsideration in light of new law, particularly since *NWCA* denied any opportunity for jurisdictional discovery. *Id.*

B. Title IX's Statutory Review. Ignoring the contrary appellate decisions cited by Petitioners, Pet. at 24, the Government cites five appellate decisions for the proposition that 20 U.S.C. §1683 does not make agency rules, regulations, and orders "reviewable by statute," outside the APA's adequate-remedy bar. Fed. Opp'n, at 13-14. As explained below, to the extent that they bear any relevance here, these five decisions argue against the Government's position, not for it.

1. *Washington Legal Found. v. Alexander,* 984 F.2d 483, 488 (D.C. Cir. 1993) ("*WLF*"), found DOE's Title VI nonenforcement unreviewable, but also found All Writs Act jurisdiction to consider DOE's unreasonable delay in finalizing a proposed agency rule or order under Title VI. Such All Writs Act review presupposes and protects courts' future jurisdiction over the final agency action by authorizing review of agency delay. *Telecomm. Research & Action Ctr. v. F.C.C.,* 750 F.2d 70, 74-75 (D.C. Cir. 1984). As such, *WLF* could not have *held* agency rules, regulations, and orders unreviewable. Indeed, by relying on the All Writs Act to preserve future jurisdiction over the eventual rule or order, *WLF* strongly suggests the exact opposite.

2. *Jersey Heights Neighborhood Ass'n v. Glendening,* 174 F.3d 180, 191-92 (4th Cir. 1999), declined review of the alleged racial impacts that would flow from the federal approval of a state transportation project. Although the federal

approval constitutes an "order," it may not constitute an "order of general applicability" under the language in 20 U.S.C. §1682 and 42 U.S.C. §2000d-1. While *Glendening* conflicts with the Sixth Circuit's more generous review under these statutes, *Selden Apartments v. H.U.D.*, 785 F.2d 152, 157-58 (6th Cir. 1986), it should not limit review of the Three-Part Test, which clearly serves as an "order of general applicability" and/or a "rule."

3. *N.Y. City Employees' Ret. Sys. v. SEC*, 45 F.3d 7, 14 (2nd Cir. 1995), involved a Securities & Exchange Commission no-action letter's changing that agency's interpretation of Rule 14a-8(c)(7) under the securities laws. As such, it did not involve statutory review under 20 U.S.C. §1683.

4. *Cousins v. Secretary of the U.S. Dep't of Transp.*, 880 F.2d 603, 604-08 (1st Cir. 1989) (*en banc*), held that APA review applies to an anti-discrimination statute that arguably incorporates Title VI's review provisions. *Cousins* did not address which clause of §704 applies (*i.e.*, reviewable by statute versus final agency action without an adequate remedy). As a first-party agency denial that found APA review, without considering §704, *Cousins* adds nothing here: "Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cousins*, 880 F.2d at 608 (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1925)).

5. Finally, the Government quotes *NWCA* to dodge Petitioners' arguments and tackle a straw man: "the reference to agency actions 'made reviewable by statute' in § 704 relates to statutory provisions other than the APA that govern judicial review of those actions." Fed. Opp'n, at 14 (*quoting NWCA*, 366 F.3d at 946-47). No one argues that *the APA*

makes Title IX rules, regulations, and orders reviewable by statute: *§903* makes them reviewable by statute. In any event, because the *NWCA* pleadings did not establish standing, "[a]ny statements... on the question of the judicial review bar would be unnecessary *dicta*." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005); Pet. at 12 ("*NWCA*'s judicial-review analysis is entirely gratuitous (*i.e., dicta*)"); Brief for the Respondent in Opp'n, at 11, *NWCA*, No. 04-922 (U.S.), 2005 WL 997132 ("[b]ecause petitioners lack standing..., [judicial review] is not properly presented here"). Having successfully argued here that *NWCA* did not "properly present" the judicial-review issue, the Government cannot now raise *NWCA* against judicial review.

Nothing in *Council of and for the Blind of Delaware County Valley, Inc., v. Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (*en banc*) ("*CBDCV*"), and its progeny overturned an action under *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (*en banc*), to review conscious, express policies under Title VI (or Title IX). Indeed, the D.C. Circuit sitting *en banc* in *Adams v. Bell* expressly and unanimously so held on the same day that it issued *CBDCV*. 711 F.2d at 167-68 & nn.35, 36; *accord* 711 F.2d at 182 & n.58 (Wright, J., dissenting). As here relevant, *Adams* differs from *CBDCV* in that the latter did not include a Title VI claim. *CBDCV*, 709 F.2d at 1525 n.15 ("district court's dismissal of the Title VI claim was not appealed"). As indicated in Section I.A, *supra*, a three-judge panel lacks the authority to overrule an *en banc* decision. As indicated previously, Title VI and Title IX unambiguously provide review of rules, regulations, and orders of general applicability. Pet. at 24-26.

C. §1983 Preemption within §704 Issue. Petitioners argue that the denial of constitutional review is particularly

acute if Title IX's implied private right of action against schools preempts an action under 42 U.S.C. §1983 to enforce the Equal Protection Clause. Pet. at 30 & n.19. The Government responds that (1) Petitioners cannot raise the argument here because they did not raise it below, and (2) in any event, the Third Circuit does not preempt the Juniata or Delaware plaintiffs' §1983 actions. Fed. Opp'n, at 13 n.5 (*citing Williams v. Sch. Dist.*, 998 F.2d 168, 175-76 (3rd Cir. 1993)). First, until the panel contradicted *NWCA* by finding *NWCA* to have settled the constitutional merits, *compare NWCA*, 366 F.3d at 947 (not reaching merits) *with* App. 3a (*NWCA* settled merits), the Juniata and Delaware plaintiffs had no reason to suspect that *NWCA* had settled constitutional issues not presented in *NWCA*. In any event, the petition plainly presents a question of the adequacy of alternate remedies. Fed. Opp'n, at I. With that issue presented below and here, Petitioners can raise any arguments here that support review on that issue. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim'") (*quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Second, far from "considering Title IX and federal constitutional claims against [the] school district," Fed. Opp'n, at 13 n.5, *Williams* very clearly upheld past Third Circuit precedent (cited by Petitioners) that "held that the constitutional claims are 'subsumed' in title IX" and that "district court[s]... properly [should] refuse[] to hear plaintiff's section 1983 claim." *Williams*, 998 F.2d at 176. The Government's argument to the contrary is baffling.

CONCLUSION

The writ of *certiorari* should be granted.

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Respectfully submitted,

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